TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted] 196

TOWAR COTTON MILLS, INC., APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED NOVEMBER 6, 1925

(30,663)

(30,682)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 717

TOWAR COTTON MILLS, INC., APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 13, 1925

[fol. 1] **IN UNITED STATES COURT OF CLAIMS**

No. C-209

TOWAR COTTON MILLS, INC.,

vs.

UNITED STATES OF AMERICA

I. PETITION—Filed March 29, 1923

The claimant, Towar Cotton Mills, Inc., respectfully represents:

1. That it was duly created as a corporation under the laws of the State of Maine to engage in manufacturing tire fabrics and heavy cotton duck.

2. That on June 24, 1918, the claimant entered into a contract with the United States government copy of which contract and of [fol. 2] the supplemental contract thereto is herewith filed as Exhibit "A" with this petition under which the contractor agreed to furnish the government 100,904 lineal yards of No. 4 gray duck for a total contract price of $107,438.40 of which the claimant performed 19.02% when the contract was thereupon terminated and cancelled by the government.

3. That at the time of and just prior to the execution of this contract the government officers demanded and required the claimant to increase its facilities, and to build a new mill and to devote its entire time to government work and give up and stop doing commercial work and the claimant provided the increased facilities, built the new mill and met all the requirements of the government officers and gave up the commercial work it had as under the facilities the claimant had at the time of negotiating the contract the quantities called for in the contract were largely in excess of the claimant's capacity.

4. That on the — day of —— the government cancelled and terminated the said contract Exhibit "A" when only 19.02% had been performed leaving 80.98% to be performed and on account of the government terminating and cancelling said contract Exhibit "A" the claimant was damaged and lost and is entitled to recover from the government for commitments, expenditures, increased facilities and other expenses and charges the sum of $36,332.65 less the credit of $14,054.79, leaving a balance due the claimant of $22,277.86 with interest from December 1, 1918, as shown by Exhibit "B" filed herewith as part of this petition:

5. That the government made the contractor an advancement [fol. 3] of $32,100 on July 6, 1918, under the supplemental agreement and the claimant put in a claim with the Claims Board for $36,332.65, and after the hearing the Board admitted that there

was $14,054.79 due the claimant and made an award for same and the government sent the claimant a voucher with request that the claimant pay the balance due to the government on the advance and that a check would be sent to the claimant for $14,054.79; this the claimant refused to do but signed and returned the voucher thereupon the government applied the amount of the admitted awards on the advance due to it by the claimant, no money was paid to the claimant and the claimant signed no release other than the voucher and there was no consideration for any release passed to or by the claimant and the amount of the award was not paid to the claimant but was credited by the government.

6. That the claimant is sole owner of the claim set forth in this petition no assignment or transfer of the same or any part thereof or interest therein has been made. Claimant is justly entitled to receive and recover from the United States of America for and on account of the violation of the said agreements the sum of $22,277.86 with interest from December 1, 1918, after allowing all credits and set offs. The claimant has at all time borne true allegiance to the government of the United States and has not in any way aided, abetted or given encouragement to its enemies. The claimant believes the facts stated in this petition to be true.

Wherefore, Claimant prays judgment against the United States of America in the sum of $22,277.86 with interest from December [fol. 4] 1, 1918, and for such other and further relief as this Honorable Court may grant, both at law and in equity, in the premises.

Towar Cotton Mills, Inc., by Henry M. Towar, President.

Jurat showing the foregoing was duly sworn to by Henry M. Towar; omitted in printing.

Exhibit "A" to Petition

War-Ord P10540-5645Eq. O. O. Pl. Form No. 7.

This agreement made this 24th day of June, 1918, between The Towar Cotton Mills, Incorporated, a corporation organized and existing under and by virtue of the laws of the State of Michigan [fol. 5] and having an office at Niles, Michigan, party of the first part, and the United States of America, by Samuel McRoberts, Colonel, Ordnance Department, National Army, acting by direction of the Chief of Ordnance, United States Army, and under the authority of the Secretary of War, party of the second part,

Witnesseth:

Whereas a state of war exists between the United States and certain foreign countries, constituting a national emergency, and the usual requirements of advertisement for bids are dispensed with,

Now, therefore, the parties hereto, in consideration of the mutual agreements herein contained have agreed and do hereby agree with each other as follows:

Article 1. Definitions.—Whenever in this contract the words hereinafter enumerated are used, they shall mean what is set opposite them;

Contractor: The party of the first party and its legal representatives, successors and assigns.

Chief or Ordnance: The Chief of Ordnance, the Acting Chief of Ordnance, or any duly authorized representative of either.

Contracting Officer: The officer in whose name this contract is executed, his successor or successors, his or their duly authorized agent or agents, and any one from time to time designated by the Chief of Ordnance to act as Contracting Officer.

Articles: The articles or things to be furnished under this contract, unless some other articles or things are specially referred to.

Article 2. Articles to be furnished.—Deliveries and prices.—The Contractor shall manufacture and deliver to the United States the [fol. 6] articles hereinbelow described, in the number or amount, at the times and at the prices below stated; said articles to comply strictly with the specifications and drawings hereto annexed or referred to below or in Schedule 1 hereto annexed; and the United States shall accept and pay for said articles upon the terms and conditions hereinafter set forth. The workmanship and quality of the articles shall, in the absence of other provisions, be the best of their respective classes and free from latent defects.

Articles: All No. 4 Grey Duck, as follows:

11,340 yards 30-inch; 11,340 yards 32-inch; 3,528 yards 36-inch. 12,288 yards 40-inch; 22,368 yards 48-inch; 22,200 yards 28-inch; 3,840 yards 74-inch; 14,000 yards 60-inch.

Price per yard net f. o. b. Niles, Michigan, as follows: 30-inch @ $0.768; 32-inch @ $0.816; 36-inch @ $0.912; 40-inch @ $1.02; 48-inch @ $1.248; 28-inch @ $0.72; 74-inch @ $1.992; 60-inch @ $1.584.

Deliveries shall be made during the month of October, 1918, as follows: 3,780 yards 30-inch; 3,780 yards 32-inch; 1,176 yards 36-inch; 4,096 yards 40-inch; 7,456 yards 48-inch; 7,400 yards 28-inch; 1,280 yards 74-inch. During the month of November, 1918, 3,780 yards 30-inch; 3,780 yards 32-inch; 1,176 yards 36-inch; 4,096 yards 40-inch; 7,456 yards 48-inch; 7,400 yards 28-inch; 1,280 yards 74-inch. During the month of December, 1918, 3,780 yards 30-inch; 3,760 yards 32-inch; 1,176 yards 36-inch; 4,096 yards 40-inch; 7,456 yards 48-inch; 7,400 yards 28-inch; 1,280 yards 74-inch; 14,000 yards 60-inch.

Article 3. Specifications.—The specifications and drawings, if any, hereto annexed or herein referred to, are made a part of this contract with like effect as if herein set out in full. In the event of any conflict between the contract and the specifications or drawings the provisions of the contract shall govern.

[fol. 7] From time to time, by written notice to the Contractor, the Contracting Officer may make changes in the specifications and drawings or supplemental or substituted specifications and drawings. If any such change increases the cost to the Contractor, a fair ad-

dition shall be made to its compensation; but if it reduces such cost a fair deduction shall be made therefrom, all as shall be determined by the Chief of Ordnance. No claim for additional compensation hereunder shall be allowed, nor shall the compensation be reduced, unless the change has been ordered in writing. For any delay in delivery attributable to such changes, a corresponding extension of time shall be allowed the Contractor.

Article 4. Component parts to be furnished by the United States.—The United States shall furnish without cost to the Contractor the materials and component parts listed on Schedule 2, in quantities determined by the Chief of Ordnance to be requisite for the performance of this contract. Should the Contractor be delayed in making deliveries of the articles by reason of delays in the furnishing of such materials or component parts by the United States, a corresponding extension of time shall be allowed the Contractor.

In addition to the raw materials and component parts listed on Schedule 2, the United States may from time to time, at its option, furnish to the Contractor other materials and component parts for use in the performance of this contract: Provided, however, That the Contractor has not previously and in good faith contracted for the purchase of such materials or component parts. Unless it is provided in writing that materials and component parts (other than those listed on Schedule 2) are furnished by the United States with-
[fol. 8] out charge, the United States shall be credited with the value thereof, f. o. b. Contractor's plant, fixed at the estimated cost of such materials or component parts used in determining the contract price of the articles the Contractor to pay demurrage, storage, cartage, and switching charges. Payments for the articles shall be reduced accordingly.

All materials and component parts furnished by the United States shall comply with specifications and shall remain the property of the United States. The Contractor shall account for all materials and component parts furnished by the United States, the cost of which has not been paid by or deducted from payments made to the Contractor, in finished product, scrap, unused material or otherwise and shall make such disposition thereof as may be ordered in writing by the Chief of Ordnance. Upon final delivery of the articles, and prior to final payment thereof the Contractor shall deliver to the Chief of Ordnance a sworn statement, in form satisfactory to him, of the quantity of such unused material or component parts remaining in the Contractor's possession.

Article 5. Change in Amounts.—This contract may be considered as completed and so certified by the Chief of Ordnance upon delivery to and acceptance by the United States of the articles, plus or minus 5 per cent thereof. In the former case there shall be a proportionate increase and in the latter case a proportionate decrease in the total amount payable under this contract.

Article 6. Delivery.—The articles shall be suitably packed, boxed and marked by the Contractor, as directed from time to time by the

[fol. 9] Chief of Ordnance, and shall be delivered by the Contractor f. o. b. cars at the railroad station nearest to the place of manufacture, unless some other place of delivery is herein specified. The Contractor shall, at the cost of the United States, ship the articles to any point in the United States designated by the Chief of Ordnance.

Article 7. Payment.—The United States shall pay to the Contractor the prices hereinbefore stated for all articles as and when delivered to and accepted by the United States. All payments shall be subject to correction for errors, if any.

Article 8. Time.—Time is of the essence of this contract. The Contractor shall give the performance hereof preference and priority over any other work except work heretofore given preference or priority by the United States. It shall, from time to time, and whenever requested so to do, furnish the Contracting Officer reports on the progress of the work.

Article 9. Inspection-Rejection.—All material and component parts unused or in process, the machinery, the equipment and the plant used in the performance of this contract, and the finished articles, shall at all times be subject to inspection by persons designated by the Chief of Ordnance, and the Contractor shall furnish reasonable facilities and assistance for all such inspection and for testing. Whatever of the materials or component parts not furnished by the United States, or of the articles, do not in all respects comply with the requirements of this contract, shall be rejected, and the decision of the Chief of Ordnance with respect thereto shall be final. The Chief of Ordnance may require the replacement of all rejected materials, component parts, and articles, and the United States may withhold from the payments to be made hereunder an amount suffi-
[fol. 10] cient to cover the cost thereof until such replacement. Upon notice from the Contractor that the articles, or any of them, are completed and ready for delivery, final inspection shall be promptly made by the United States.

The process of manufacture shall be at all times subject to the inspection and supervision of the Chief of Ordnance.

Article 10. Care of Property.—The Contractor shall use due and proper care to protect all property of the United States in its possession. Such property shall be suitably marked for identification and shall be kept separate and apart from other property.

Article 11. Storage.—The Contractor shall provide at its plant storage capacity sufficient for the storage of — days' deliveries of articles at the rate of deliveries herein specified. From time to time, and for so long as the Chief of Ordnance may require, the Contractor shall safely and adequately store to the extent of such storage capacity any accepted articles which the United States is not ready to have shipped; such storage to be at the risk of the United States but at the cost of the Contractor. By written notice, the Chief of Ordnance at anytime may require the Contractor promptly to furnish additional storage capacity sufficient to store not more than — days' additional

deliveries at said rate. Thereafter from time to time and for so long as the Chief of Ordnance may require, the Contractor shall safely and adequately store any accepted articles to the extent of such additional storage capacity, but at the cost and risk of the United States. The additional storage capacity shall be furnished at the Contractor's [fol. 11] plant, if practicable, and when that is not practicable, at a place adjacent to or near the plant. Subject to the approval of the Chief of Ordnance, such place shall be selected by and the arrangements made therefor by the Contractor. If a portion of the land and buildings then belonging to the Contractor be used for such additional storage, the United States will pay to the Contractor a reasonable rental therefor, to be agreed upon, or, in the absence of an agreement, to be fixed by the Chief of Ordnance.

The articles stored under the provisions of this article after final inspection and acceptance shall be paid for as though they had been delivered f. o. b. cars, but the Contractor shall thereafter, upon the request of the United States and at the expense of the United States, transport the articles stored to the nearest point of shipment by railroad, load the same on cars and ship the same to such point of destination as the Chief of Ordnance may direct. The United States shall pay to the Contractor all expense incurred for transportation of the articles to storage and cost of unloading and reloading cars at place of storage.

Article 12. Excusable Delays.—The Contractor shall not be held responsible for delays in delivery determined by the Chief of Ordnance to be due to delay in inspection, delay in the giving of shipping instructions to the Contractor, explosions, fires, riots, labor strikes, acts of war, acts of God, or to any other causes beyond the control of the Contractor. The Contractor shall use its best efforts to remove such cause of delay as speedily as possible, and immediately upon the removal thereof shall proceed with the performance of this contract. The time for the making of deliveries shall be extended by the period of such delay, provided application therefor be made in [fol. 12] writing within thirty (30) days after the removal of such cause for delay. Where, however, such delays have been substantial and not due to any act or omission of the United States, the Chief of Ordnance shall have the option either to cancel this contract or any of the deliveries that have been delayed upon the terms set forth in Article 14 hereof or to permit the Contractor to proceed with the performance of the contract.

Article 13. Breach by Contract.—If the Contractor shall abandon this contract or shall violate any material provision thereof, or shall fail at any time to prosecute with diligence the manufacture of the articles or the performance of this contract or if this contract shall be assigned, the Chief of Ordnance may, without prejudice to any other rights or remedies or to any claim which the United States may have, terminate this contract by written notice and complete the performance hereof or enter into agreements with other parties for the completion of the performance hereof in whole or in part or purchase in the open market or otherwise any articles remaining unde-

livered hereunder; and the Contractor shall pay to the United States all loss and damage incurred as a result of such action.

Article 14. Termination.—This contract being necessitated by a state of war now existing, it is desirable and expedient that provision be made for its cancellation upon fair and equitable terms in the event of the termination or limitation of the war, or if any anticipation thereof or because of changes in methods of warfare the Chief of Ordnance should be of the opinion that the completion of this contract has become unnecessary. It is therefore provided that at any time, and from time to time, during the currency of this contract, the [fol. 13] Chief of Ordnance may for any of the causes above stated notify the Contractor that any part of the articles then remaining undelivered shall not be manufactured or delivered.

In the event of such complete or partial termination the United States shall inspect all completed articles then on hand and such as may be completed within thirty (30) days after such notice, and shall pay to the Contractor the price herein fixed for all articles accepted by and delivered to the United States. The United States shall also pay to the Contractor the cost of the materials and component parts purchased by the Contractor for the performance of this contract and then on hand in an amount not exceeding the requirements for the completion of this contract provided they comply with the specifications, and also all costs shown by the Contractor to have been theretofore necessarily incurred in the performance of this contract and remaining unpaid; and the United States shall also protect the Contractor on all obligations incurred necessarily and solely for the performance of this contract of which the Contractor can not be otherwise relieved. To the above may be added such sums as the Chief of Ordnance may deem necessary to fairly and justly compensate the Contractor for work, labor and service rendered under this contract.

Title to all such materials and component parts paid for by the United States under this article shall, immediately upon such payment, vest in the United States.

The United States may refuse to make any payment or to reimburse the Contractor for or on account of material or component parts intended to form a part of articles, whether unused or in the process of manufacture or manufactured, in respect of the delivery of which the Contractor shall be in arrears not due to causes beyond its control [fol. 14] at the time of such termination.

Article 15. Precautionary Measures.—In addition to the ordinary precautions heretofore adopted by the Contractor for the guarding and protection of its plant and work, the Contractor shall provide such additional watchmen and devices for protection of its plant and property and the work in process for the United States against espionage, acts of war, and of enemy aliens as may be required by the Chief of Ordnance. The Contractor shall, when required, report to the Chief of Ordnance, the citizenship, country of birth or alien status of any and all of its employees. When required by the

Chief of Ordnance the Contractor shall refuse to employ, or if already employed, forthwith discharge from employment and exclude from its works any person or persons designated by the Chief of Ordnance for cause as undesirable for employment in a plant engaged on work for the United States. The United States shall pay to the Contractor as part of the cost of articles any expense incurred by the Contractor which shall be determined by the Chief of Ordnance to be directly caused by the requirements of this article.

Article 16. Exploitation Forbidden.—The Contractor agrees to refrain from exploiting by publicity or otherwise its products manufactured in pursuance of this contract, and of any and all contracts and others heretofore or hereafter entered into or placed with the Contractor, and its products manufactured under any arrangements with the United States whatsoever, and the Contractor agrees to refrain from publicly advertising the fact of the manufacture of said product, and to refrain from publishing or causing or allowing to be published any photographs, drawings, written or printed matter, [fol. 15] or other data disclosing the articles, or parts of the same, or the process of manufacture, or the plans of the Government, or any information concerning the same or which shall result in such disclosure. The Contractor agrees to submit to the Chief of Ordnance all pictures or printed matter showing, describing, or in any way relating to the progress of the work to be prosecuted under this contract and under any and all contracts and orders heretofore or hereafter entered into or placed with the Contractor, or under any arrangements with the United States whatsoever, which he may desire to publish, before publishing the same, and the Chief of Ordnance may prohibit such publication. The Contractor further agrees to refrain from giving any information whatsoever relative to any experiments that may be carried out by it at the instance of the United States.

Article 17. Contract not assignable.—The Contractor shall not assign, transfer, or otherwise dispose of this contract or any part thereof without the written consent of the Secretary of War, nor shall it assign any moneys due or to become due hereunder.

Article 18. Subcontracts.—The Contractor shall insert in every contract hereafter made in relation to the performance of this contract, a provision that such contract may be assigned by the Contractor and that it relates to this contract. The Contractor shall, from time to time, upon request, exhibit to the Contracting Officer any and all contracts made in connection with the performance of this contract.

Article 19. Waiver of liens.—The Contractor hereby waives and releases all lien or right of lien now existing or that may hereafter [fol. 16] arise for work or labor performed or materials furnished or for any other reason or cause under this contract, under any lien laws, State or Federal, upon any component parts, materials, supplies, and the like coming into its possession, which it is herein contemplated shall presently or ultimately become the property of

the United States, and the Contractor agrees not to create or suffer to be created any mortgage, lien, pledge, attachment, or other encumbrance upon any such component parts, materials, supplies, or other property in its possession intended to form a part of the articles to be delivered under this contract. In the event that such mortgage, pledge, lien, attachment, or encumbrance is created, the Contractor agrees to pay and discharge or if it disputes the validity of the claim out of which such encumbrance arises, immediately to bond same to the end that all property shall at all times be and remain free from all encumbrances.

Article 20. Disputes.—Except as herein otherwise specifically provided, any doubts or disputes which may arise under this contract or as to its performance or nonperformance shall be referred to the Chief of Ordnance for determination. If the Contractor shall feel aggrieved at his decision, it shall have the right of appeal to the Secretary of War, whose decision shall be final.

Article 21. Patents.—The Contractor hereby covenants and agrees to hold and save the United States and all persons acting under them harmless from and against all and every demand or demands of any nature or kind for or an account of the adoption of any plan, model, design, or suggestion or for or on account of the use of any patented invention, article, or appliance that has been or may be [fol. 17] adopted or used in or about the construction of said articles, or any part thereof, under this contract, and to protect and discharge the United States from all liability on account thereof, or on account of the use thereof, by proper releases from the patentees, and by bond if required, or otherwise, and to the satisfaction of the Chief of Ordnance.

Article 22. Notice.—Any notice addressed to the Contractor at its principal office and either there delivered or deposited in a postpaid wrapper in any post-office box regularly maintained by the United States, shall be deemed to have been served upon the Contractor. The address of the Contractor may be changed at any time by notice in writing to the Contracting Officer. Nothing herein contained shall preclude service of notices upon the Contractor (1) where it is a corporation by delivery thereof to any of its officers or directors in person; (2) where it is a firm by delivery thereof to one of the partners; (3) where it is an individual by delivery thereof to him in person.

Article 23. Officials not to Benefit.—No Member of or Delegate to Congress or Resident Commissioner is or shall be admitted to any share or part of this contract or to any benefit that may arise therefrom; but this article shall not apply to this contract so far as it may be within the operation or exception of section 116 of the act of Congress approved March 4, 1909 (35 Stats., 1109).

Article 24. Prison Labor.—No person or persons shall be employed in the performance of this contract who are undergoing sentence of

imprisonment at hard labor which have been imposed by the courts of the several States, Territories, or municipalities having criminal jurisdiction.

[fol. 18] In witness whereof, the parties hereto have caused this contract to be duly executed in triplicate by their respective officers, thereunto duly authorized, the day and year first above written.

(Signatures:) Towar Cotton Mills, Inc. Scott C. Towar, Contractor. United States of America, by Samuel McRoberts, Colonel, Ordnance Department, National Army, Contracting Officer.

Witness: F. H. Stokes, Boone G. Harding, by Chas. N. Black, Lt. Col. Ord. N. A.

Schedule 1 Attached to and a Part of a Certain Contract Bewteen the United States of America and Towar Cotton Mills, Inc., and dated the 24th day of June, 1918.

Each and every of the pamphlets, drawings, specifications, and other papers enumerated is made a part of the schedule and of the contract of which this schedule is a part.

Specifications: It is understood that the Grey Duck embraced by this contract shall have 29 warp ends per inch of 4 ply No. 7 yarn and 20 filling picks per inch of 5 ply No. 7 yarn. In all other respects, however, Ordnance Office Specifications for Duck dated March 28, 1918, shall be followed.

Drawings: None.

[fol. 19] Costs under Article 14 shall be determined in accordance with the pamphlet entitled "Definition of 'Cost' Pertaining to Contracts," issued by the Office of the Chief of Ordnance, War Department, dated June 27, 1917, made a part hereof by reference.

NOTE.—The pamphlet here referred to will be found on page 28 of this record.

Schedule 2: None.

War Credits Board. No. Ordnance 214

Towar Cotton Mills, Inc., and United States of America Supplemental Agreement for Advance Payment

In consideration of the mutual promises hereinafter mentioned, and other valuable consideration, it is agreed by and between the Towar Cotton Mills, Inc., incorporated under the laws of the State of Maine with an office at Niles, Michigan (hereinafter described as contractor), of the one part, and the United States of America (hereinafter described as the Government), acting by the officer whose name first appears below (hereinafter described as the contracting officer), of the other part, as follows:

Article 1. This agreement is supplemental to a contract between [fol. 20] the parties hereto, dated June 24, 1918, and bearing number War-Ord. P10540-5645 Eq. together with modifications and amendments, if any, and acceptances thereof by the contractor, hereinafter collectively referred to as the Principal Agreement, under which the contractor agreed to deliver to the Government supplies consisting of Grey Duck.

Article 2. In the interest of both parties hereto, and in order to expedite the delivery of the said supplies, the Government shall make an advance payment to the contractor under the Principal Agreement, to an amount not exceeding the sum of Thirty-two Thousand One Hundred Dollars ($32,100.00) on the terms and security hereinafter mentioned, and shall make payment by check directly to the contractor.

Article 3. The contractor shall use the money advanced under this agreement solely to pay for machinery, equipment, and raw materials required in the direct performance of the Principal Agreement, unless otherwise authorized in writing by the War Credits Board.

Article 4. The contractor shall as hereinafter provided, account to the Government for the amount of said advance payment, with interest on the outstanding balances thereof at the rate of seven per cent per annum for the month now current and thereafter at such rate or rates as the War Credits Board may from month to month determine.

This advance payment shall be applied and credited in part payment for the supplies to be furnished by the contractor under the Principal Agreement; and for this purpose the contractor authorizes [fol. 21] the Government, acting through its proper disbursing officer, to deduct thirty-five per cent from the gross face amount of each voucher for supplies hereafter presented by the contractor under the Principal Agreement, and to apply such deductions as credits of the said vouchers, until the Principal of this advance payment in full, and thereafter the interest accrued on the outstanding balances thereof, shall — been recouped by the Government; the dates when vouchers are paid to govern in computation of interest and in the determination of outstanding balances. If these deductions are not made or deductions are made of a different percentage than specified, the proper disbursing officer is hereby authorized to make such other and additional deductions from subsequent vouchers as will cause the total deductions to equal the above specified percentage. But the last deduction shall not exceed an amount equal to the balance of the said advance payment and interest then accrued. The contractor may, however, at any time, return to the Government in cash, the entire outstanding balance of the said advance payment, with accrued interest, or any part thereof.

If the total amount of this advance payment with interest accrued thereon shall not be applied and credited, as aforesaid, or

if the contractor for any reason, whether through its own fault, or otherwise, shall not furnish to the Government the supplies in whole, or any part thereof, as provided in the Principal agreement, even though the Government shall terminate said Principal Agreement, or any part thereof, or if the contractor shall become insolvent, or shall commit an act of bankruptcy, or if the contractor's assets shall be placed in the hands of a receiver, the contractor shall immediately return to the government any balance of the said advance payment and interest, after deducting the total of any credits [fol. 22] made as hereinafter provided, together with all liquidat-d accounts that may be due and owing under the Principal Agreement from the Government to the Contractor.

Article 5. Each voucher submitted by the contractor for payment under the Principal Agreement shall bear a statement on the face thereof, specifying the amount to be deducted from the gross face amount thereof, as hereinbefore provided.

Article 6. So long as any portion of the above mentioned advance payment and accrued interest shall not have been applied in payment for supplies, as herein provided, or returned to the Government, the contractor shall not, without the written consent of the War Credits Board:

(a) Pledge or place any lien or encumbrance on, or suffer any lien or encumbrance to be placed on, its assets or property.

(b) Sell or dispose of its accounts receivable.

(c) Pay any dividends on its Common Capital Stock.

Article 7. As collateral security for the performance by the Contractor of this Supplemental Agreement and the return of the above mentioned advance payment, and any interest accrued thereon, the contractor shall furnish to the Government on the signing of this agreement:

(a) The demand note of the contractor for Thirty-two Thousand One Hundred Dollars ($32,100.00) of even date herewith, bearing interest at the rate of six per cent per annum and payable to the order of the Secretary of War on behalf of the United States of America at his office in Washington, D. C.

[fol. 23] (b) A bond in the sum of Thirty-two Thousand One Hundred Dollars ($32,100.00) and in form and with surety as may be approved by the War Credits Board, and conditioned on the performance by the contractor of its obligations under this agreement.

On failure of the contractor, at any time, to comply with the terms of this agreement, the Government may sell the said demand note at public or private sale, or otherwise, and at one or more sales, and with or without notice to the contractor, applying the proceeds after payment of the costs of sale toward the repayment of the above mentioned advance, and interest accrued thereon, and accounting to the contractor for the balance, if any. The Government may become the purchaser of the said note at any such sale, free of all trusts and claims whatsoever.

Article 8. The Government shall not negotiate nor demand payment of the note mentioned in the preceding article so long as the contractor is not in default under this agreement, or under the Principal Agreement.

Article 9. On the complete performance by the contractor of its obligations hereunder, the Government shall return to the contractor the said note and bond referred to in the article number 7 hereof.

Article 10. Any right or discretion herein given to the Government may be exercised by the Secretary of War or the Contracting Officer. The existence of any default hereunder on the part of the contractor may be determined by the Secretary of War or the Contracting Officer, and his determination shall be final and binding on the parties. The terms Secretary of War and Contracting Officer, [fol. 24] as used herein, shall extend to and include their respective successor and successors in office, and their respective representative or representatives thereto duly authorized.

Article 11. Except as provided herein, the Principal Agreement shall be unchanged.

In witness whereof the parties have caused these presents to be signed in their names and on their respective representatives thereto duly authorized this sixth day of July, 1918.

Executed in six parts.

For the Towar Cotton Mills, Inc., Scott C. Towar, Its President. For the United States of America, Samuel McRoberts, Colonel, Ord. N. A., by William Willaims, Lt. Col. Ord. Dept.

Witnesses: C. B. Garver, J. H. W., W. J. B., E. W. Fairbanks.

July 7, 1918.

EXHIBIT "B" TO PETITION

Towar Cotton Mills, Inc., Niles, Michigan

Statement of Claim Against the United States Government Arising [fol. 25] by Reason of Suspension of Contract P10540-5645 Eq. for 100,904 Lineal Yards of No. 4 Grey Duck, Total Contract Price $107,438.40

F. Special Facilities:

1. Basis of Amortization—

Total Product Contracted for.....	$107,438.40	100.00%
Product Completed	20,435.89	19.02%
Amount uncompleted	$87,002.51	80.98%

2. Unamortized portion of Net Cost of Special facilities provided by the contractor especially to meet the requirements of this contract—		
Cost, per schedule and invoices attached	$896.22	
Deduct fair commercial value at date of termination of this contract	10.00	
Net Cost	$886.22	
Unamortized portion thereof. 80.98%		$717.66
Claim on Contract P10540—5645 Eq—PC4707		
3. Unamortized portion of excess cost of construction of new mill incurred to increase the productive capacity of the contractor's plant to the degree necessary to fulfill the terms of this contract—		
Excess cost per schedule attached $18,518.54		
Unabsorbed portion thereof, 80.98%		$14,996.31
G. Storage of Government Property subsequent to termination of contract		45.00
H. Cost to contractor due to decline in cotton market at time of termination of this contract affecting the unused cotton applicable to this contract as follows—		
Total cotton necessary for full production under this contract.	233,277 lbs.	
Weight of cotton used on finished duck under this contract	43,894 lbs.	
Weight of unused cotton applicable to this contract	189,383 lbs.	
Average cost of total cotton applicable to this contract	$0.3208	
Market price at termination of contract per letter from Stephen M. Weld & Co., Cotton Brokers, dated June 9, 1919, copy of which is attached	0.2700	
Loss per pound due to termination of contract	$0.0508	
Total loss 189,383 lbs. at $0.0508		9,620.65

[fol. 26]

J. Claims for other compensation:

1. Unamortized portion of cost of surety bond required by the United States on loan to contractor made July 8, 1918, to assist in financing this contract—

Premium on bond per invoice of Fidelity and Deposit Co. of Maryland, copy of invoice attached	$321.00	
Unamortized portion hereof	80.98%	259.95

2. Unamortized portion of interest on loan from the United States the principal of which was used in fulfilling this contract. At the date of termination of this contract and subsequent thereto the unpaid balance of this loan has been used by the contractor in carrying a portion of this claim:

Loan dated July 8, 1918 for	$32,100.00
Interest to Dec. 31, 1918	7%
Interest after Dec. 31, 1918	6%

Computation of interest:

July 8, 1918, to October 31, 1918.

Payment on Principal—interest thereon

Date	Amount	Interest rate	Amount of interest
Oct. 23, 1918	$1,403.50	7%	$28.80
Oct. 29, 1918	1,400.41	7%	30.35
Nov. 6, 1918	1,427.91	7%	33.14
Nov. 13, 1918	1,244.78	7%	30.56
Nov. 18, 1918	1,160.26	7%	29.60
Nov. 20, 1918	515.60	7%	13.35
	7,152.46		165.80
Remaining due 24,947.54 to Dec. 31 1918		7%	842.06
24,947.54 to Oct. 31, 1919		6%	1,247.37
	$32,100.00		2,255.23

Unamortized portion thereof, 80.98% $1,826.28

3. Unamortized portion of cost of "setting up" and "taking down" machinery preparatory to and subsequent to production under this contract		
Cost of setting up and taking down per schedule attached.	$1,585.50	
Unamortized portion thereof..	80.98%	$1,283.94
4. Services of public accountants engaged in audit and preparation of claim (invoice attached)...		563.91
5. Unamortized portion of net loss on cord tire machinery caused by the [fol. 27] undertaking of this contract:		
Total cost.....	$33,430.01	
Fair commercial value at date of termination of contract.....	24,975.00	
Net loss to contractor.....	$8,455.01	
Add:		
Interest charged by Pyans, Fraser & Blackway Co. on cost of machinery purchased from them, date of purchase to June 2, 1919, per invoice rendered.....	212.50	
Total loss.....	$8,667.51	
Unamortized portion thereof..	80.98%	$7,018.95
Total Claim.....		$36,332.65
Less award credited to loan.....		14,054.79
Balance due with interest from December 1, 1918.....		$22,277.86

[fol. 28] NOTE.—This is the pamphlet referred to on page 19 of this record.

War Department, Office of the Chief of Ordnance

DEFINITION OF "COST" PERTAINING TO CONTRACTS

These Definitions Are Subject to Modification or Change as may be from Time to Time Determined by the Chief of Ordnance

June 27, 1917

Washington, Government Printing Office, 1917

[fol. 29] Definition of "Cost" Pertaining to Contracts

[These definitions are subject to modification or change as may be from time to time determined by the Chief of Ordnance]

1. The purpose of these definitions is to convey to the contractor the general principles involved in the accounting for the cost of the articles contracted for with the United States, and which will be adhered to by the contracting officer in the settlement of and payment therefor, and also in so far as it is possible at the present time to furnish suggestions for the guidance of the contractor in accounting matters pertaining to contracts with the United States.

2. It is not the purpose of the contracting officer to prescribe the form of accounting or the particular books and records to be used by the contractor in connection with contracts for the United States, or to suggest changes of any kind where the contractor has established accounts, books, and records that conform to good accounting practice and can furnish therefrom the necessary data required to compute the cost of manufacture as defined herein.

3. It is the desire, however, of the contracting officer that, in so far as it is practicable and possible to do so, the contractor shall maintain separately from all other records pertaining to his business the records and accounts pertaining to contracts with the United States. The contractor may be directed to maintain a separate ledger to contain the necessary accounts in connection with such contracts, a separate bank account, also separate record of pay rolls, stores records, vouchers, summaries, bank checks, etc., for the purpose of facilitating the clerical labor of both parties concerned.

4. The contractor shall supply the contracting officer with such details and statistics pertaining to the cost of production as he may require from time to time, on forms to be supplied by the contracting officer. The cost shall be calculated from the date the contractor shall commence any work or manufacturing operation in connection with articles contracted for, of which date he shall duly notify, in writing, the contracting officer and the Finance Division, Ordnance Department.

5. The following general definition of cost is contained in contracts and indicated therein as "Schedule II."

[fol. 30] 6. The term "Cost" as applied to this contract consists of four elements, which are concretely defined in the following:

(1) The cost of all direct labor paid for by the contractor and used in the production of the articles contracted for herein.

(2) The cost of all direct materials contained in or forming part of the articles contracted for herein.

(3) Prorata share of factory overhead expenses applicable to and necessary in connection with the manufacture of the articles contracted for herein.

(4) Prorata share of administrative and general expense applicable to and necessary in connection with the manufacture of the articles contracted for herein.

1. Direct Labor.

7. Direct labor (or known or productive labor) consists of wages paid for labor performed upon (and that can be charged directly to) the articles contracted for or the component parts thereof. Allowance for overtime and premium shall be considered as direct labor and chargeable to the operation, component part, or article on which such overtime or premium applies. (Indirect Labor unknown, see Factory Overhead Expense.)

8. The contractor shall maintain a daily time report in connection with each workman engaged on direct labor, setting forth the following information:

(1) Description of operation, component part or article worked upon, and the number of hours chargeable thereto.

(2) Quantity of operations or pieces completed.

(3) Hourly rate, or piecework price.

(4) Amount of overtime allowance.

(5) Total amount earned.

9. Summaries of these daily time reports shall be maintained by contractor, and the information classified thereon in such a manner as will make it possible to readily determine the total cost of all direct labor applicable to any operation, component part, or article, and all articles manufactured under contract with the United States; these summaries to be prepared periodically, and shall conform to the pay roll periods of the contractor.

10. The rate of wages paid shall not exceed the rate of wages being paid for the various classes of work involved in the locality in which the work is done. In general, salaries and wages will conform to the necessities of the situation.

2. Direct Materials.

11. The term "Direct materials" applies to raw materials and component parts purchased for use in and becoming a part of the article contracted for. Where contract specifications call for special packing and containers the cost of such packages and containers shall be classified as direct materials.

[fol. 31]

12. The contractor shall prepare in advance and submit to the contracting officer a complete bill of material setting forth the following details in connection with material and parts in one article (or unit) contracted for:

(1) Description of part (name part number, etc.).

(2) Description of material contained in each part (kind of material, dimensions, weight, etc.).

(3) Quantity of each part necessary to assemble one unit complete.

(4) Unit cost of material used in each part.

(5) Direct material cost of part.

(6) Total cost of direct material in article or unit.

13. The cost of "direct materials" will be the "net cost" to the contractor, i. e., invoice cost, less cash, trade, and quantity discounts; plus duty, import expense, freight and drayage paid by contractor.

14. The contractor shall take advantage of all discounts available, and when unable to take such advantage shall promptly notify the contracting officer of his inability and the reasons therefor.

15. The contractor shall always be in a postion to furnish the contracting officer with original purchase invoices, with original receipted freight and expense bills attached thereto. The contracting officer will furnish the necessary forms in connection with the receiving of, and the making of reports and summaries, of the cost of direct materials used in the articles contracted for.

16. Materials and supplies purchased for the account of the articles contracted for shall be stored in spaces or inclosures separate and apart from material and supplies purchased by the contractor for the account of others than the United States, and marked in such wise as to always keep the same separately identified.

17. The inspectors and auditors representing the contracting officer shall at all times have access to those places where material in connection with the articles contracted for is received, stored, used, processed, and shipped, and all of the records maintained in connection therewith.

18. It will in all cases be necessary for the contractor to furnish satisfactory evidence of the receipt of said materials and supplies, the consumption or usage of same in production, and at all times be able to account for the balance shown by the records to be "on hand" in stores or "in process" of manufacture.

19. It shall be within the jurisdiction of the inspectors representing the contracting officer to direct the collection of scrap, designate storage places for same, and certify to the quantity or weight sold.

[fol. 32] 20. If the contracting officer authorizes the contractor from time to time to sell scrap and defective material resulting from materials owned by the United States, the statements of such sales sales shall be submitted to the contracting officer on forms provided for the purpose, and the proceeds thereof shall be credited to the account of contracts for the United States.

Special Purchase of Temporary Buildings, Machinery, and Equipment

21. Temporary buildings, machinery, equipment, etc., purchased by the contractor upon the authority of the contracting officer for use in connection with manufacturing the articles contracted for, which equipment becomes the property of the United States, shall not be classified as direct materials, upon which any percentage of profit shall be paid to the contractor. The cost of the same shall be reported to the Finance Division, Ordnance Department, on forms provided therefor.

22. Labor performed by the contractor in connection with the setting, erection, or construction of such equipment shall be subject only to the overhead expense that applies to the department of the contractor's plant that furnishes the labor, such as direct supervision thereof, time keeping, and expense incidental thereto and a reasonable allowance for factory management, general plant expense, or administrative expense.

23. The total cost of such equipment including erection or setting shall not be subject to any addition for profit to the contractor as aforesaid unless otherwise specified in the contract, or approved in writing by the contracting officer.

24. The contractor shall, as he may be called upon by the contracting officer, furnish complete detail inventories of the property of the United States in the custody of the contractor.

3. Factory Overhead Expense.

25. Factory overhead expense is represented by the wages paid to superintendents, foremen, factory clerks, and indirect labor (or non-productive labor), also supplies, perishable tools, and materials used in connection with the operation of the machinery and the upkeep of plant, depreciation, portion of taxes, portion of insurance, and other expenses hereinafter enumerated.

26. The contractor shall maintain his records in such a manner as will enable the contracting officer to determine the quantities and detail costs of all items of factory expense entering into the operation of each of the manufacturing departments through which the articles contracted for pass in process of manufacture in the period during which the plant is manufacturing the articles contracted for.

[fol. 33] 27. An outline of accounts is herein suggested by the Finance Division (cost accounting section) of the Ordnance Department, and it is recommended that these or similar accounts be maintained by the contractor, unless the contractor has in effect accounts of a similar nature, or accounts better adapted to the requirements of his plant. This outline indicates the various classes of expense that are recognized as factors in that portion of the cost referred to as "Overhead expense."

28. The following principal accounts are recommended in connection with the accounting for the expense of each factory department (producing or nonproducing) that contributes directly or indirectly to the cost of the articles contracted for:

(1) Supervision and clerical salaries (foremen, clerks, timekeepers, etc.).

(2) Indirect labor (nonproductive, such as trucking, cleaning, inspecting, repair men, oilers, etc.).

(3) Supplies used (oils, waste, cleaning, hardening, tempering, and grinding supplies, etc.).

(4) Fuel (oil, coal, coke, gas, etc.).

(5) Small tools (of a perishable nature, such as drills, files, reamers, blades, saws, etc.).

(6) Water.

(7) Repairs to machinery and equipment. (See special reference "Repairs.")

(8) Liability insurance.

(9) Insurance on machinery and equipment (when owned by contractor). (See special reference "Insurance.")

(10) Depreciation of machinery and equipment. (See special reference "Depreciation.")

(11) Power (pro rata share of power expense).

(12) Building maintenance (pro rata share of building maintenance expense). (See accounts Nos. 20 to 25 for distribution.)

(13) Factory management and general plant expense (pro rata share of factory management and general plant expenses). (See accounts Nos. 30 to 35 for distribution.)

Maintenance of Buildings

29. The following accounts are recommended in connection with the accounting for the expense incidental to the maintenance of buildings (where buildings are owned by contractor) in which are contained departments contributing to the production of the articles contracted for.

(20) Labor (janitors, watchmen, elevator men, electricians, millwrights, etc.).

[fol. 34] (21) Repairs to buildings (extraordinary repairs become a charge to the reserve account established for depreciation). (See special reference to "Repairs.")

(22) Power, light, and heat.

(23) Taxes on real estate and buildings (accrued).

(24) Insurance on buildings (accrued).

(25) Depreciation of buildings.

30. The expense represented by accounts numbered 20 to 25 constitutes the charge for maintenance of buildings and can be distributed over the departments contained therein based upon the floor space occupied.

Factory Management and General Plant Expense

31. The following accounts are recommended in connection with the accounting for the necessary expense incidental to factory management and general plant expense.

(30) Salaries (factory manager, superintendents, purchasing agent, cost accounting, and factory-office staff, employment and welfare, etc.).

(31) Personal taxes (applicable to the plant, and particularly to the property involved in the manufacture of the articles contracted for).

(33) Undistributed freight and express and drayage (on incoming materials and supplies purchased and used on contracts for the United States).

(34) General plant supplies and expense (stationery, sanitary supplies, telephone, traveling, ice, water, etc.).

(35) Safety, fire prevention, etc.

32. The expense represented by accounts numbered 30 to 35 can be diffused over the factory departments based on the pay roll (direct labor basis may be used where in effect).

Application of Factory Overhead Expense to Product

33. The purpose of this accounting is to distribute the cost of building-maintenance expense (plant rental), factory management and general plant expense, and all nonproducing departments over the producing departments and in turn distribute the cost of producing departments to the product made therein.

34. In such cases where all the facilities of the contractor's plant are devoted exclusively to the manufacture of articles contracted for by the United States, the distribution of overhead expense involves no complications and will not require the introduction of any special accounting in connection therewith.

[fol. 35] 35. In such cases where the facilities of the contractor's plant are devoted in part to the work of others than the United States the basis best adapted to the individual conditions or requirements of the plant must be recognized and used. There are three methods in general use, viz:

(1) As a per cent on direct labor.

(2) Direct labor hour.

(3) Machine hour.

36. Whenever an equitable basis of distribution of overhead expense is established in any plant it shall be continued and used for the determination of cost. Whenever no equitable basis or no basis whatever exists the auditor representing the contracting officer, in cooperation with the contractor, shall establish a basis which will be subject in all cases to the approval of the contracting officer and to later revision if necessary.

37. The following special references are made to certain elements of expense that are worthy of the attention of the contractor:

Repairs

38. The cost of repairs considered as overhead expense are those repairs and alterations which are made currently to provide for the ordinary and regular upkeep of the plant, the cost of which is a usual and fairly consistent annual charge. Repairs and alterations of a general nature which are necessary only at intervals of more than a year, or replacements and unusual repairs which would involve a significant increase in the overhead expense shall not be considered as expense, but shall apply against the reserve established to provide for depreciation.

Insurance

39. The contracting officer assumes all fire risks in connection with the materials delivered by his order to the plant of the contractor and all material purchased by the contractor for the manufacture of articles contracted for by the United States. The contractor therefore shall not assume as a cost insurance expense in connection with such material or the direct labor or expenses thereon as specified in the foregoing, unless otherwise authorized by the contracting officer.

Depreciation

40. Depreciation shall be considered as an element of expense allowable on the property owned and used by the contractor in connection with the manufacture of the articles contracted for. For the purposes of determination of an equitable basis for depreciation [fol. 36] on property the contracting officer will be influenced by definitions set forth in the revenue bill approved September 8, 1916, section 302, together with Treasury Decisions in respect thereto in so far as the requirements of said revenue bill and Treasury Decisions are applicable to and not inconsistent with the terms of contract and special conditions thereto pertaining.

[Extract from Revenue Bill Approved Sept. 8, 1916]

Title III, Section 302

(f) A reasonable allowance, according to the conditions peculiar to each concern, for amortization of the values of buildings and machinery, account being taken of the exceptional depreciation of special plants.

41. Regulation No. 39, issued October 24, 1916, by the Treasury Department, No. 2384, interpreting depreciation as stated in a munition-tax law of September 8, 1916, reads as follows:

Art. XX. (A) The deduction authorized on account of depreciation relates to the loss due to use, wear, and tear of physical property owned and used by a manufacturer, but which is not specially designed or installed for the purpose of manufacturing munitions or parts thereof, and which, without material alteration and change, may be used in connection with any other business in which the person is or may be hereafter engaged.

(B) The annual deduction on this account will be a reasonable allowance determined upon the basis of the cost and probable number of years constituting the life of the property.

(C) If the same building and machinery or other equipment are used coincidentally for the purposes other than the manufacturer of munitions or parts thereof, then the amount deducible from the gross income returned for the purpose of this title on account of depreciation will be apportioned in accordance with the rule hereinbefore set out for apportioning running expenses, and the deduction from the gross income contemplated by this title will be made accordingly.

Art. XXI. (A) Section 302 of this title authorizes a deduction to meet the conditions peculiar to each concern and has for its purpose the amortization of the values of buildings and machinery constituting special plants which will, except for salvage, have no substantial value to the manufacturer when the contracts executed or to be executed for the manufacturer of munitions or parts thereof have been fully performed.

(B) The deduction authorized on this account relates to property (buildings, machinery, and equipment) especially constructed or installed for use in the manufacture of munitions or parts thereof and which, when no longer useful for this purpose, can not, without material alteration or change, if at all, be used for any other purpose, the life of which property is substantially coincident with the life of the contracts.

(C) The annual allowance to be deducted on this account will be determined by estimating the probable number of years the property will be used in the manufacture of munitions or parts, and by dividing the cost of such property, less estimated salvage, by such

probable number of years. The quotient thus obtained will measure the amount to be deducted each year on account of amortization, until the cost of the property has been extinguished. Or the cost of the property may be amortized on the basis of the quantity of [fol. 37] munitions or parts thereof manufactured under contracts in connection with the fulfillment of which the buildings and machinery or equipment were specially constructed or installed.

(D) Neither the depreciation nor the amortization deduction allowable in the return made for the purpose of this title will relate to property used in connection with any other business carried on by the manufacturer. Amortization applies only and particularly to those special plants and equipment whose life and value, except salvage, will terminate with the end of the business for which they were erected and equipped. It is to be differentiated from depreciation in that depreciation relates to property whose life and value is not dependent upon or materially affected by its use in the manufacture of munitions or parts thereof.

4. Administrative and General Expense.

42. Administrative and general expense consists of that expense necessary and incidental to the administration and general office activities of that portion of the contractor's business that is devoted to and necessary to the fulfillment of contracts with the United States.

43. It is definitely understood that there shall be excluded from the administrative and general expense all expense incidental to the promotion of or making sales, advertising, losses on bad debts, contributions, subscriptions, and expenses of similar nature. The contractor shall maintain in a separate classification or division of accounts all salaries and expenses incidental to the selling department of his business.

44. The following accounts are recommended in connection with the accounting for the expenses incidental to the Administrative and General activities of the business that pertain to contracts with the United States:

(40) Salaries of executives.

(41) Salaries of office employees (exclusive of sales and advertising department employees).

(42) Salaries of engineering department (engineers, draftsmen, and supplies used in connection with work on contracts for the United States).

(43) Taxes (excepting Federal taxes and taxes included in account No. 23 under maintenance of buildings and account No. 31 under factory management and general factory expenses).

(44) Stationery and supplies (for office use).

(45) Postage, telephone, and telegraph.

(46) Traveling.

(47) Incidental expenses (not provided for in the foregoing).

45. In such cases where a part of the plant of the contractor is engaged in the manufacture of articles for others than the United States, the expense represented in expense accounts Nos. 40 to 47, shall be prorated either on a basis of the total factory cost (total [fol. 38] factory cost being made up of the sum of all direct labor, direct materials, and factory overhead expense) or on a basis of the direct labor.

46. Where the entire product of the plant is devoted to the completion of contracts for the United States then shall the total of administrative and general expense become a charge to contracts of the United States.

47. Interest on investment or on bonded debt shall not be considered as an expense entering into the cost of contracts for the United States, but the contracting officer will reimburse the contractor for interest paid by it on money borrowed to finance the purchase of materials necessary to complete contracts for the United States. Interest cost will not be considered as a cost to the contractor upon which profit is to be calculated.

[fol. 39] II. Answer and Counterclaim—Filed May 23, 1923

Comes now the defendant, by its Attorney General, and for its answer and counterclaim herein states as follows:

Answer

1. Defendant admits the execution of the contract dated the 24th day of June, 1918, in the words and figures as set forth in the first division of Exhibit A, attached to plaintiff's petition; and said instrument is referred to hereinafter as the Principal Agreement.

2. Defendant admits the execution of the Supplemental Agreement for Advance Payment dated the 6th day of July, 1918, in the words and figures as set forth in the second division of Exhibit A, attached to plaintiff's petition; and said instrument is referred to hereinafter as the Supplemental Agreement.

3. Defendant denies each and every allegation of plaintiff's petition not herein specifically admitted.

4. Defendant alleges that each and every obligation and requirement assumed by the United States under the terms of said Principal [fol. 40] Agreement made on the 24th day of June, 1918, has been fully paid off and discharged.

5. Defendant denies that it is indebted to plaintiff in the sum charged by said petition or in any sum whatever.

Counterclaim

6. Defendant alleges that, pursuant to the terms of said Supplemental Agreement executed on the 6th day of July, 1918, the defendant herein paid to plaintiff on said date, in lawful money of the United States, the sum of Thirty-two Thousand One Hundred Dollars ($32,100.00), as an advance payment, and that plaintiff received the same.

7. Defendant alleges that, in pursuance of the terms of said Supplemental Agreement, and on receipt of said money from the United States, plaintiff did, on said 6th day of July, 1918, for value received, sign, execute, and deliver to defendant a Demand Note in the sum of $32,100.00 with interest at the rate of 6 per cent per annum from date until paid, a copy of said Demand Note being hereto attached and made a part of this counterclaim, and marked "Defendant's Exhibit No. 1."

8. Defendant alleges that it was provided in Article 4 of said Supplemental Agreement that, upon the presentation by the contractor of each voucher for supplies under terms of the Principal Agreement, 35 per cent of the gross face amount thereof should be applied, first to the repayment to the United States of the principal [fol. 41] of said advance payment, and thereafter to the payment of the interest accrued on the outstanding balances thereof.

9. Defendant alleges that it was further provided in Article 4 of said Supplemental Agreement that, if said advance payment had not been previously repaid in full, with the interest thereon, the entire final balance due the contractor under said Principal Agreement should stand subject to such repayment.

10. Defendant alleges that it has been repaid to date the sum of $21,207.25 on the principal of said advance payment, leaving due and unpaid thereon a balance of $10,892.75; that the accrued interest on the respective balances, after said principal repayment deductions, as calculated to the 31st day of March, 1923, pursuant to the terms of said Demand Note and the provisions of Articles 4 and 7 of said Supplemental Agreement, amounted to $5,046.85; and that said balance of said advance payment still owing to the United States by plaintiff, together with said accrued interest, amounted on the 31st day of March, 1923, to the sum of $15,939.60, as will appear by a "Statement of Unrecouped Advance Made to the Towar Cotton Mills, Inc.," hereto attached and made a part of this counterclaim and marked "Defendant's Exhibit No. 2."

11. Defendant alleges that it has, from time to time, made demand of plaintiff for the payment of said balance of said advance payment and said accrued interest, but that no part thereof has

ever been paid, and that there now remains due and unpaid thereon [fol. 42] the sum of $15,939.60, together with interest at 6 per cent on $10,892.75 thereof since the 31st day of March, 1923.

Prayer for Judgment

12. Wherefore defendant prays the court: That the prayer of plaintiff for judgment be denied; that judgment be entered in favor of the United States and against the plaintiff in the sum of Fifteen Thousand Nine Hundred Thirty-nine Dollars and Sixty Cents ($15,939.60), together with interest at 6 per cent on $10,892.75 thereof from the 31st day of March, 1923, to date of judgment; and that the costs of printing the record in this cause be taxed against the plaintiff.

Robert H. Lovett, Assistant Attorney General. Edw. D. Hays, Special Assistant to the Attorney General.

[fol. 43] DEFENDANT'S EXHIBIT No. 1

(Documentary stamps $6.12.)

Washington, D. C., July 6, 1918.

$32,100.00.

On demand Towar Cotton Mills, Inc., promises to pay to the order of the Secretary of War on behalf of the United States of America, Thirty-two Thousand One Hundred Dollars, at the office of the Secretary of War in Washington, D. C., with interest at the rate of six per cent per annum from date until paid.

Value received.

(Signed) Towar Cotton Mills, Inc., by Scott E. Towar, Pres.

DEFENDANT'S EXHIBIT No. 2

Statement of Unrecouped Advance Made to the Towar Cotton Mills, Inc.

Date of advance, July 6, 1918.
Amount of advance, $32,100.00.
Rate of interest, 7% from date of advance until January 1, 1919; 6% thereafter.

Balance	Date	Rate	No. of days	Accumulated interest	Recouped
$32,100.00	7- 6-18—10-31-18	7%	117	$720.22	$1,403.50
30,696.50	11- 1-18—11- 8-18	7%	7	41.21	1,400.41
29,296.09	11- 9-18—11-15-18	7%	6	35.32	1,427.91
27,868.18	11-16-18—11-19-18	7%	3	17.66	1,244.78
26,623.40	11-20-18—11-25-18	7%	5	29.43	1,160.26
25,463.14	11-26-18—12- 5-18	7%	10	58.86	515.60
24,947.54	12- 6-18—12-31-18	7%	25	147.15	.....
24,947.54	1- 1-19— 6- 4-20	6%	521	2,136.58	[1] 14,054.79
10,892.75	6- 5-20— 3-31-23	6%	1,039	1,860.42	.....
10,892.75				5,046.85	21,207.25

[fol. 44] $32,100.00 Advance.
21,207.25 Recouped.

10,892.75 Balance due the United States.
5,046.85 Interest due the United States up to March 31, 1923.

15,939.60 Total amount due the United States as of March 31, 1923.

[fol. 45] III. PLAINTIFF'S ANSWER TO DEFENDANT'S COUNTERCLAIM—Filed July 25, 1923

Now comes the plaintiff, Towar Cotton Mills, Inc., and says that the defendant, the United States, is not entitled to recover anything from it on its counterclaim or set off as the said defendant is indebted to the plaintiff in a greater sum than the amount claimed in the said set off.

Towar Cotton Mills, Inc., by Henry M. Towar, President.

I, Henry M. Towar, being first duly sworn, depose and state that I am President of the Towar Cotton Mills, Inc., that I have read the foregoing plea or answer and that the defendant is not entitled to recover against the plaintiff on its counterclaim or set off as the de-

[1] Award.

fendant is indebted to the plaintiff in a larger amount than the amount claimed in the said set off or counterclaim.

Henry M. Towar.

Subscribed and sworn to before me this 20th day of July, 1923. Given under my hand and official seal this 20th day of July, 1923. Cyrus R. Funk, Notary Public. (Seal.)

Raymond M. Hudson, Attorney for Plaintiff.

IV. Argument and Submission

On May 26, 1924, this case was argued and submitted on merits by Mr. Raymond M. Hudson, for the plaintiff, and Mr. Edw. D. Hays, for the defendant.

[fol. 46] **V. Findings of Fact, Conclusion of Law, and Memorandum Entered by the Court**—Filed June 9, 1924

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact

I

The plaintiff is a corporation organized and existing under the laws of the State of Maine, and on June 24, 1918, entered into a contract with the United States under the terms of which it agreed to furnish the Government 100,904 lineal yards of No. 4 grey duck at the contract price of $107,438.40. A copy of said contract is attached to the petition marked "Exhibit A," and is made a part hereof by reference. And on July 6, 1918, the plaintiff entered into a supplemental contract with the United States under the terms of which the United States advanced and paid to the plaintiff the sum of $32,100. A copy of said supplemental contract is attached to the petition as a part of its Exhibit A and is made a part hereof by reference. In pursuance of the terms of said supplemental contract the plaintiff executed and delivered to the United States the following note:

$32,100.00. Washington, D. C., July 6, 1918.

On demand Towar Cotton Mills, Inc., promises to pay to the order of the Secretary of War, on behalf of the United States of America, thirty-two thousand one hundred dollars, at the office of the Secretary of War in Washington, D. C., with interest at the rate of six per cent per annum from date until paid.

Value received.

Towar Cotton Mills, Inc., by Scott C. Towar, Pres.

[fol. 47] II

The plaintiff began performance of its contract and complied with all the terms thereof until November 15, 1918, on which date the United States canceled the contract as provided for in article 14 thereof. On the day of the cancellation of the contract the plaintiff had performed 19.02 per cent of said contract, leaving 80.98 per cent unperformed. The contract work which was performed was paid for by the United States.

III

The plaintiff presented its claim for $36,332.65 to the Purchase Claims Board. This claim was made up of items for loss on raw material, unamortized cost of special facilities, and other items, which are set out in plaintiff's Exhibit B attached to the petition and made a part hereof by reference. On appeal the claim reached the Board of Contract Adjustment, where a decision was rendered on April 28, 1920, allowing certain items disallowed by the Purchase Claims Board. The claim was returned to the latter board for settlement in accordance with the decision of the Board of Contract Adjustment, and the Purchase Claims Board made an award of $14,054.79, which award was accepted by the plaintiff on June 3, 1920. The award was as follows:

Award Form I (Revised)

C. & E. Division, Seventh Zone. Claim No. PC 4707.
This form to be used when a single award is to be made.

Award of Secretary of War under the Act of Congress entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," approved March 2, 1919.

It appearing to the satisfaction of the Secretary of War that an agreement was entered into in good faith between the Towar Cotton Mills (Inc.), Niles, Michigan, the claimant, and Charles N. Black, Lt. Col., Ord., N. A. an officer or agent acting under the authority, direction or instruction of the Secretary of War, on or about the 24th day of June, 1918, during the emergency arising from the declaration of war with the German Empire and prior to November 12, 1918, for a purpose connected with the prosecution of the war; that the agreement had been performed in whole or in part or expenditures had been made or obligations incurred by the claimant on the faith of such agreement, prior to November 12, 1918; that the agreement has not been executed in the manner prescribed by law; that the said agreement is within the provisions of the above-entitled act of Congress; that the nature, terms and conditions of said agreement are set out in Form C, certificate of Claims Board, office director of purchase, No. PC 4707, dated August 26, 1919, on file in

the War Department; that the claimant presented his claim to the Secretary of War before June 30, 1919:

[fol. 48] Block 2.—That there have heretofore been delivered by the claimant and accepted by the United States under the said agreement 21,217 yards duck, of the fair aggregate value of $20,435.89; that the said sum of $20,435.89 paid or to be paid for said articles or work heretofore delivered and accepted, together with the additional sum of $14,054.79, will adjust, pay, and discharge such agreement upon a fair and equitable basis, and that such sum will not include prospective or possible profits on any part of the agreement beyond the goods and supplies delivered to and accepted by the United States thereunder and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said agreement.

M. E. M. 4/25/19. PC-4707. Cancellation Agreement —, Dated —— —, 1919.

Brief of Settlement

Zone Seven, Chicago, Ill. C. & E. Div.
2. Contractor: The Towar Cotton Mills (Inc.), Niles, Mich.
3. Original contract number: 5645 EQ. Dated June 24, 1918.
4. Authorization number —.
5. Article: #4 Grey duck.
6. Unit price: 30″ @ $.768; 36″ @ $.912; 40″ @ $1.02¢; 48″ @ $1.248; 32″ @ $.816; 28″ @ $.72; 74″ @ $1.992; 60″ @ $1.584.
7. Total value: $107,438.40.
8. Value undelivered portion: $87,002.31.
9. Finished articles to be accepted: Quantity, 21,217 yds.; price, $20,435.89.
10. Finished articles to be canceled: Quantity, 79,687; contract price, $87,002.51.
11. Amount to be paid for cancellation (itemized on separate sheet): $14,054.79.
12. What percentage of total price of canceled articles (item #10) is the amount to be paid for cancellation (item #11): 16%.
13. Claims of Government to be deducted $-.
14. Remarks: (Use separate sheet if necessary.)

Approved —— —, 1919.
Board of Contract Review, M. & E. M. Div. By —— ——.

Approved —— —, ——.
—— ——, Acting Chief, M. E. & M. Division.

Approved —— —, ——, 1919.
Claims Board, Officer Dir. of Purchase, by —— ——.

Approved —— —, ——.
War Department Claims Board, by —— ——, Col. of Eng. U. S. A., Member.

[fol. 49] Towar Cotton Mills (Inc.), Niles, Michigan

Cont. #P-10540-5645 EQ. PC-4707. Item #11 of brief.

#1. Raw material, loss on 189,383 # cotton @$.0405 per #		$7,670.01
#2. Partly finished materials, none.		
#3. Special facilities:		
(a) Machinery & equipment	$627.34	
3% inward handling frt	18.82	
Liquidate 19.2% completed	646.16	
Part of contract	124.06	
Total mach. & Equip		522.10
(b) Excess cost of new mill, allowance at per memorandum agreement		2,500.00
(c) Setting up and taking down machinery	1,585.50	
Liq. 19.2% Bal. 80.8% chargeable		1,281.08
#4. Other items:		
(a) Bond	321.00	
80.8% chargeable		259.37
(b) Interest as Exhibit "J" of sworn statement of claim	2,255.23	
80.8% chargeable		1,822.23
Total net claim		14,054.79

Award Form I (Revised). Claim No. PC 4707.

(Strike out block 3 if there have been no previous deliveries.)

The Secretary of War hereby awards to said claimant the sum of $14,054.79 (block 3), which sum, in conjunction with the payments herein above mentioned made or to be made for the articles, work or services heretofore delivered and accepted shall be in full adjustment, payment, and discharge of said agreement.

(Strike out blocks not applicable.)

(Block 7) No part of this award is made with respect to any portion of the agreement which was sublet.

Recommended —— —, 1919.

Zone No. —.

Board of Review Division, by —— ——.

Approved, Washington, D. C., 6/4/1920.

Claims Board, Office Director of Purchase, by R. R. Holder (Sgd.), Member.

Made and approved by authority of the Secretary of War:

War Department Claims Board, by J. L. Schley (Sgd.), Member.

Accepted June 3rd, 1920.

Towar Cotton Mills, Inc. (Sgd.), Claimant, by Henry M. Towar (Sgd.), Treas.

Dated 6/4/20, Washington, D. C.

All of the items set up by the plaintiff in this suit were embodied in the claim on which the aforesaid award was made.

[fol. 50] IV

On July 6, 1918, the United States advanced to the plaintiff the sum of $32,100, for which plaintiff executed its note set out in Finding I. Under the terms of the supplemental agreement heretofore referred to the plaintiff from time to time made recoupment payments as follows: October 31, 1918, $1,403.50; November 8, 1918, $1,400.41; November 15, 1918, $1,427.91; November 19, 1918, $1,244.78; November 25, 1918, $1,160.26; December 5, 1918, $515.60; aggregating the sum of $7,152.46, all of which payments were credited on the principal sum. The United States also credited on said note the sum of $14,054.79, the amount of the award aforesaid, making the total payments by the plaintiff on the aforesaid note the sum of $21,207.25. This amount credited on the principal sum of $32,100 leaves due on the loan made by the United States to the plaintiff the sum of $10,892.75, as of June 3, 1920, the date on which the award aforesaid was accepted by the plaintiff.

The contract provided that Form 2941, entitled "Definition of 'Cost' Pertaining to Contracts," should be looked to in ascertaining the cost of contracts for the United States. This form provided as follows:

"27. Interest on investment or on bonded debt shall not be considered as an expense entering into the cost of contracts for the United States, but the contracting officer will reimburse the contractor for interest paid by it on money borrowed to finance the purchase of materials necessary to complete contracts for the United States. Interest cost will not be considered as a cost to the contractor upon which profit is to be calculated."

Conclusion of Law

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is not entitled to recover and that its petition be, and the same is hereby, dismissed.

The court is of opinion that the United States is entitled to recover from the plaintiff the sum of $10,892.75 with interest thereon at the rate of six per cent per annum from June 3, 1920, until paid. It is therefore adjudged and ordered that the United States recover of and from the plaintiff the sum of ten thousand eight hundred and ninety-two dollars and seventy-five cents ($10,892.75) with interest thereon at the rate of six per cent per annum from June 3, 1920, until paid, and also the cost of printing the record in this case.

Memorandum

In this case the plaintiff has not proved the items of its claim. But if it had, it is bound by the award and its acceptance thereof, Delaine Mills, Inc., v. United States, 57 C. Cls. 453, 459.

The plaintiff is also bound to pay the balance due on its note to the United States. There has been no reason advanced by the plaintiff why it should not be so bound, and we are therefore constrained to enter judgment for the amount so due with interest.

[fol. 51] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the ninth day of June, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order and adjudge that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same is dismissed; and it is further ordered and adjudged that the United States is entitled to recover from the plaintiff the sum of Ten thousand eight hundred and ninety-two dollars and seventy-five cents ($10,892.75) with interest thereon at the rate of six per cent per annum from June 3, 1920, until paid; and also the sum of Sixty-seven dollars and thirty-two cents ($67.32), the cost of printing the record in this court to be collected by the Clerk as provided by law.

VII. HISTORY OF PROCEEDINGS AFTER ENTRY OF JUDGMENT

On July 18, 1924, the plaintiff filed a motion for a new trial and a motion to amend the findings of fact.

VIII. ORDER OVERRULING MOTION FOR NEW TRIAL—Entered October 20, 1924

It is ordered by the court this 20th day of October, 1924, that the plaintiff's motion for new trial be and the same is overruled.

IX. PETITION FOR APPEAL—Filed October 20, 1924

Now comes the plaintiff, and moves the Court to grant it an appeal to the Supreme Court of the United States from the judgment of the Court entered in this case on June 9, 1924. This motion is made without prejudice to, and without waiving the plaintiff's motions for, a new trial, and amended findings of fact, hereto filed, and still pending and undetermined before the Court, and it is asked [fol. 52] that this motion to appeal, be not determined until after the decision on the motions for a new trial, and amended findings of fact.

Raymond M. Hudson, Attorney for Plaintiff.

Presented for filing Sept. 6, 1924.

X. Order Allowing Appeal—October 20, 1924

It is ordered by the Court this 20th day of October, 1924, that the plaintiff's application for appeal be and the same is allowed.

In Court of Claims

[Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and memorandum entered by the court; of the judgment of the court; of the history of proceedings after the entry of judgment; of the order of court entered October 20, 1924; of the plaintiff's application for an appeal and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this Thirty-first day of October, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal Court of Claims.)

Endorsed on cover: File No. 30,682. Court of Claims. Term No. 717. Towar Cotton Mills, Inc., appellant, vs. The United States. Filed November 6th, 1924. File No. 30,682.

FILED
JAN 27 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

October Term, 1925.

No. 196.

TOWAR COTTON MILLS, Inc.,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

Appeal From the Court of Claims.

APPELLANT'S BRIEF.

RAYMOND M. HUDSON,
Attorney for Appellant.

THE REPORTER CO., WALTON, N. Y.
New York Office: 233 Broadway, Room 402. Phone 6070 Barclay.
1926

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925,

No. 196.

TOWAR COTTON MILLS, Inc., Appellant, vs. THE UNITED STATES OF AMERICA, Appellee.	Appeal From the Court of Claims.

APPELLANT'S BRIEF.

Statement of the Case.

This is an appeal from a judgment of the Court of Claims with a findings of fact and a memorandum opinion, dismissing the petition for $22,277.86 with interest from December 1, 1918, and entering a judgment on a counterclaim under the same contract in favor of the appellee for $10,892.75 with interest at 6 per cent from June 3, 1920, and $67.32 costs (59 Ct. Cls. 841).

On June 24, 1918, the appellant entered into a contract with the United States Government, copy of which contract and of the supplemental contract thereto for an advance payment of $32,100 is filed as Exhibit "A" to the petition (R. 2 to 13), under which the appellant agreed to furnish the Government 100,904 lineal yards of No. 4 gray duck for a total

contract price of $107,438.40, of which the appellant performed 19.02 per cent when the contract was thereupon terminated and cancelled by the Government on November 15, 1918 (R. 31, Finding of Fact II).

The contract (R. 11, Art. 3) states that the money advanced was "solely to pay for machinery, equipment, and raw materials." Article 8 (R. 5) *makes time the essence of the contract,* and that likewise the *Government shall have preference and priority over civilian work.* The appellant testified that the contract was taken solely on the understanding that they were to put up the new mill, and were to be protected therefor under the contract. Mr. Scott C. Towar testified:

> "Q. Did Government officers require the claimant to increase the mill's facilities and devote its entire time to Government work? A. It did.
>
> "Q. Did you increase your facilities as testified to by Mr. Henry Towar? A. We did.
>
> "Q. Would you have increased your facilities and built your mill if you had not been promised this contract? A. No; we would not.
>
> "Q. Did you, as soon as you met the requirements and were promised the formal contract, begin the work on the increased facilities and build the new mill? A. Yes."

This testimony was not disputed and the terms of the contract corroborate it.

The Board of Contract Adjustment (Vol. 5, p. 55), in its opinion, conceded and admitted that the terms of the contract, Exhibit "A," were fixed under the understanding between the ordnance officers and the contractor that the increased facilities should be put in and commercial work dropped, and in the so-called award that is in the record (R. 31), which is not

properly an award, there was an allowance of $2,500 for the excess cost of the new mill, which excess cost, the Board said appellant was entitled to as it was the amount that appellant had to pay to rush the completion of the mill in time to manufacture the articles for delivery under the contract.

The appellant filed a claim for $36,332.65 and the War Department allowed $14,054.79 and improperly and incorrectly made out an award under the Dent Act, and sent it to the appellant, asking the appellant to send in its check for the balance claimed under the advancement, and to write on the award "accepted" and then the Government would send the appellant $14,054.79. The appellant refused to send its check or to receive the $14,054.79, but through a misapprehension and inadvertently did so sign the so-called award under the word "accepted" on June 3, 1920, and sometime afterwards, the Government, not being able to get appellant to settle with it, arbitrarily applied the $14,054.79 to what it claimed was due it on the *"advance payment."*

There was no payment of money to, or received by, the appellant; there was no value or consideration for its signing the acceptance on the award, which is void and invalid, nor was there any acquiescence therein.

Mr. Henry M. Towar testified:

> "Q36. Will you look at Paragraph 5 of the petition, pages 2 and 3, and state whether or not it actually sets forth the fact as to the credit by the Government of $14,054.79? A. It does.
>
> * * * * *
>
> "Q56. In your petition on page 5 you state that the claimant signed and returned the voucher, did you not? A. As I recall it, the

> Government asked us to give them our company's check for the total amount due, whereupon they would give us their check for the amount of the award, namely, $14,054.79, which settlement we refused to accept. The Government letter used the words 'voucher' and 'award' synonymously, both referring to the claim of $14,054.79.
>
> "Q57. Then the signature attached to the award wherein you accepted the award is the only signature you have signed concerning the payment of the said sum of $14,054.79? A. It is."

This is not disputed and the appellant's letter of transmittal corroborates it.

It is agreed that at the time of the cancellation on November 15, 1918, the appellant had on hand 189,383 pounds of cotton, which cost $.3208 per pound, for which the Government was liable, but the Government contended that in fixing the loss of the appellant, the average market price of the cotton from December 1, 1918, to March 31, 1919, should be the basis for settlement and the difference between that average price and cost price which was $.0405 should be paid the appellant by appellee. Whereas the appellant contends, as admitted and proven, that on November 15, 1918, cotton was only worth $.27 and that it disposed of the cotton at that time and prior to December 1 at that price in a civilian contract, which was completed before the end of January, and that the appellant was entitled to $.0508 loss, being nearly $.01½ more than the Government contended. There wasn't any increase in price from November 15th until late in January, and then it went up, the largest advance being in March.

The appellant proved a storage item of $45 for

storage subsequent (R. 4) to cancellation and the appellant proved all the other items of the claim, on some of which appellant was cross-examined to some extent.

The Court of Claims held that the so-called award was accepted and that it barred the appellant from any consideration of the rest of its claim.

The Government calculated interest at 7 per cent for some time on its "advance payment," although the note called for only 6 per cent interest.

The so-called award set out in Finding III (R. 31 and 32) under Paragraph 13 stated, "Claims of Government to be deducted $."

As the award thus determined that there was nothing due the Government under the contract on which the award is based, then under a technical construction the award should be held to bar any recovery by the Government, as the "advance payment" was under this same contract.

The Court credited the award as of June 3, 1920, whereas if it should be credited at all, it should be as of November 15, 1918, the date the appellee voluntarily cancelled the contract.

The Board of Contract Adjustment found 25 per cent performed and 75 per cent unperformed, but when it sent the claim back to Claims Board, Director of Purchase, for checking, they accepted appellant's figures, 19.2 per cent and 80.8 per cent, as correct and did not dispute the accuracy of any of appellant's figures in its claim, but only contested their applicability. Thus appellant's $9,620.65 (R. 14) and their $7,670.01 (R. 33) loss on the conceded 189,383 pounds of cotton, appellant's figures being based on price as of November 15, 1918, date of cancellation,

and theirs being based on average price from December, 1918, to March 31, 1919. Again appellant's $14,996.31 cost of new mill (R. 14), their $2,500 (R. 33) allowing only for cost of extra time work to rush completion of new mill and so as to other items of claim.

The appellee took its choice and risked its whole defense on the finality and so-called acceptance of the award as to appellant, but not final as to counterclaim of appellee, but this was before the Court of Claims had decided an award under the Dent Act was final also on appellee.

The Court of Claims, though, based its decision boldly on the finality, and so-called acceptance, of the award, but not being willing to take the chance of reversal that appellee took, attempted to foreclose a review of the effect of the award and so-called acceptance by arbitrarily refusing to find facts proven by undisputed and unquestioned witnesses, and facts that were admitted.

As compensation under the last clause of the second paragraph of Article 14 (R. 7), there is set up in the suit, and claimed, the amount of any balance that was due on the advance payment; see the petition, Paragraph 6 (R. 2), claiming a balance of $22,277.86 after allowing all set-offs and credits which includes the "advance payment."

The appellee is not entitled to recover as the contract, Article 14, Paragraph 2, and last half of Clause 2 (R. 7), provides as follows:

> "And the United States shall also protect the Contractor on all obligations incurred necessarily and solely for the performance of this contract of which the Contractor cannot be otherwise relieved."

The supplemental part of the contract making the advance payment, provides that it is to be used in the contract, and the evidence shows that the Contractor is not otherwise able to be relieved of the obligations, the Government having on its own accord terminated the contract.

The definition of costs on the settlement of this contract, which is made part of the contract by Section 47 (R. 26), provides that the contractor shall not pay interest on this advance payment or similar loans, or rather he shall be reimbursed by the Government for such interest.

The contract, Clause 4, Paragraph 2, Article 14, Exhibit "A" (R. 7), clearly commands that the appellant shall be allowed fair and just compensation when the Government terminates the contract; and this is mandatory. It is as follows:

> "To the above may be added *such sums* as the Chief of Ordnance may deem necessary to fairly and justly compensate the Contractor for work, labor and service rendered under this contract."

It does not say *such sums*, "if any," as in other contracts.

No part or item of the claim in this suit comes under the above clause or provision and the appellant is entitled to an allowance under it.

The appellant is asking for $22,277.86 with interest from December 1, 1918, without allowing any set-off to the Government in the alleged balance claimed by it, as Article 14 requires the Government to protect the appellant in all obligations that cannot be otherwise relieved.

Assignments of Error.

The Court erred in holding:

1. That there can be an award under the Dent Act on a formal contract.

2. That by signing an acceptance of such award and at the same time refusing to receive payment thereof and refusing to pay a balance claimed, the appellant waived all the balance and other items of its claim.

3. That where a contract is cancelled November 15, 1918, the market value of the left over raw material for which the Government is admittedly liable must be fixed at the average market value from December 1, 1918, to March 31, 1919, and not the market value on November 15, 1918.

4. That the Court of Claims need not, and can refuse to, find material, necessary and relevant facts, which are not disputed after the Court has decided a law question against the appellant so as to thus arbitrarily foreclose a review of the law question by this Court.

5. That the award should be credited June 3, 1920, the date thereof, instead of November 15, 1918, the date of cancellation.

6. That the appellant was not entitled to be released from the advance and all interest under Article 14 (R. 7).

7. That it was not mandatory or obligatory on the Chief of Ordnance to allow appellant some compensation under Article 14.

8. That the appellee was entitled to judgment and in allowing 7% interest part of the time.

9. The award valid under the Dent Act and then allowing appellee to recover under the contract, settled by the award, as the award specifically sets out that there are no "Claims of Government to be deducted" from the award.

10. That appellant is not entitled to recover $22,277.86 or any part thereof, with interest from November 15, 1918.

The Argument.

POINT I.

The Secretary of War has no authority to make a valid and binding Dent Act award under a formal contract and if he had, the mere signing thereon under the word "accepted" by appellant, who not only does not receive any money under the award but refuses to so receive any, does not constitute a release of balance on items set out in award nor a release of "fair and just compensation" under the terms of the contract, no part thereof being included in the award; there is no consideration for such release.

This was a formal legal contract and not a Dent Act implied contract (*Union Twist Drill Co. vs. U. S.*, 59 Ct. Cls. 909).

Article 14 (R. 7), after providing for property costs and other actual losses, provides *fair and just com-*

pensation which includes profits; such compensation is mandatory but no sum is included in the so-called award to cover it.

The Court in *McKiernan-Terry Drill Co. vs. U. S.*, 61 Ct. Cls. (December 7, 1925), held that storage subsequent to cancellation is not released by a settlement contract in full payment of contract.

Should the Court construe the award as accepted and as broad enough to cover the items of this suit, then it is void and ineffective to that extent as being without consideration and beyond the intent of the parties, for the Court said in *C., M. & St. P. Ry. vs. Clark*, 178 U. S. 353; 20 Sup. Ct. 924 at 929:

> "In *U. S. vs. Bostwick*, 94 U. S. 53, 67; 24 L. ed. 65, 66, it was said that 'payment by a debtor of a part of his debt is not a satisfaction of the whole except it be made and accepted upon some new consideration.'
>
> "In *Fire Ins. Co. Asso. vs. Wickham*, 141 U. S. 564, 577; 35 L. ed. 860, 866; 12 Sup. Ct. Rep. 84, 87, Mr. Justice Brown stated the doctrine thus: 'The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise but will be treated as without consideration and void.'"

This rule was approved in *San Juan vs. St. John Gas Company,* 195 U. S. 510; 25 Sup. Ct. at 112, where the Court quoted from the *C., M. & St. P. Ry.* case as follows:

> "Because of the well established rule 'that where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such for want of consideration.'"

In *Cramp vs. U. S.,* 216 U. S. 494; 30 Sup. Ct. 392, it was held that claims for unliquidated damages on account of extra work caused by the Federal Government are not included in a release given to the United States by the builders of a battleship, of all and all manner of debt, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of the vessel under the contract, provided that the release shall not be taken to include claims arising under the contract other than those which the Secretary of the Navy has jurisdiction to entertain, although the release, if in the form specified in the contract, would have extinguished all claims against the United States, growing out of such contract.

In *Houston Coal Company vs. U. S.,* 262 U. S. 361; 43 Sup. Ct. 612, it was held that where the claimant not only accepted seventy-five per cent of what the President fixed as a fair compensation but actually accepted the full amount of the President's determination, he did not bar his right to sue for the balance he claimed and the opinion, while brief, when read in the light of the brief and the decisions cited in the brief, can lead to but one conclusion, namely, that the plaintiff in this case cannot have cut off his

right to sue for the items involved by the release that was given.

The decision in the case at bar is right in the teeth of *St. L., B. & M. Ry. Co. vs. U. S.*, 268 U. S. 169, 45 Sup. Ct. 472; *So. Pac. Co. vs. U. S.*, 268 U. S. 263, 45 Sup. Ct. 500; and *Western Pac. R. Co. vs. U. S.*, 260 U. S. 271, 45 Sup. Ct. 503.

There being no payment of *fair and just compensation* which is mandatory, then only part of the debt to appellant is provided for in the award.

POINT II.

If the so-called award is a valid and binding award, and was accepted so that appellant cannot sue and recover other and further items and sums, then such award is equally binding and conclusive on appellee and it cannot sue and recover on its counterclaim for "advance payment" under the same contract, as the award stated there was nothing due the appellee under the contract.

Since the decision in the case at bar, the Court of Claims has decided (*Standard Steel Car Co. vs. U. S.*, No. A307, May 11, 1925, 60 Ct. Cls.), that where the Secretary of War made an award under the Dent Act, which is accepted and paid, that thereafter the United States is estopped to sue to recover money claimed to have been illegally paid under the contract covered by the award, unless there was actual fraud, and the Court said, "A claimant being estopped from any further remedy by acceptance of an award, a theory which was invoked by the Government in the

Delaine Mills case, it seems but a just application of the same principle to hold the Government equally bound, unless, of course, it has been 'defrauded.'"

Of course, appellant denies that the award is valid, that it was accepted or that there was any consideration for it, but if it is a bar "to any further remedy" by appellant it is equally a bar to appellee's counterclaim.

POINT III.

The date a Government contract is cancelled all amounts afterwards found due contractor must be credited on any amounts due the Government as of the date of cancellation so as to stop interest as of that date, and all valuation of property under the contract is the market value at the date of cancellation, and this is especially true where cancellation clause requires "cancellation upon fair and equitable terms" and also to "fairly and justly compensate the contractor."

In *Vogelstein vs. U. S.*, 262 U. S. 337, 43 Sup. Ct. at 565, the Court said:

> "The market value of the copper taken *at the time* it was taken measures the owner's compensation (*Seaboard Air Line Ry. Co. vs. U. S.*, 261 U. S. 306, 43 Sup. Ct. 354, 67 L. ed. , decided March 5, 1923; *U. S. vs. Chandler-Dunbar Co.*, 229 U. S. 53, 80, 81, 33 Sup. Ct. 667, 57 L. ed. 1063; *Boom Co. vs. Patterson*, 98 U. S. 403, 407, 25 L. ed. 206; *U. S. vs. New River Collieries Co.* [C. C. A.], 276 Fed. 690, affirmed this day, 262 U. S. 341, 43 Sup. Ct. 565, 67 L. ed.)."

In the *New River Collieries Co.* case above, the Court says:

> "The owner cannot be required to suffer pecuniary loss."

Clearly the time for fixing the price of the cotton was the day the Government cancelled the contract, as it cancelled it and not the appellant, and the appellant could not be required to carry the burden, and loss of interest on money invested in cotton, and to risk the fall in price on the chance of a rise to benefit the Government; the appellant immediately after November 15, 1918, accepted a commercial contract basing its price on this cotton at $.27 per pound, which was its custom in all former commercial and Government contracts, on the price of the raw material at the date of the contract.

The Government having chosen to exercise its right to terminate the contract must pay for the left over material at market prices of same on the day of termination, as appellee picked that day. This is necessary on the principle applied in cases where the Government takes property.

There is no rule of law to differentiate the two, and appellant cannot be, in equity and justice, forced to settle at the price of the material four months later; might just as reasonably make appellant settle at price four years later.

Price at time of refusal to deliver by Government controls when Government breaches its sale. *Roberts vs. Bargamin,* 124 U. S. 64, 8 Sup. Ct. 393; *March vs. McPherson,* 105 U. S. 709; *Consumers Company vs. Stafford Co.,* 239 Fed. 693; *Ralli vs. Rockmore,* 111 Fed. 875; and other cases cited in *Hummel, Trustee, vs. U. S.,* 58 Ct. Cls. 489 at 496.

POINT IV.

The granting of fair and just compensation under Article 14 (R. 7), is mandatory and is not barred by acceptance of the so-called award which does not include any sum for such compensation.

The clause quoted from Article 14 (R. 7) for additional compensation clearly entitled the appellant to that asked in the account, Exhibit "B," and the word "may" in there clearly should be construed as mandatory, meaning "must" or "shall" (see 5 *Words and Phrases*, 4419, and cases cited). It does not say *such sums*, "if any," as provided in many contracts.

In *Pearson vs. Supervisors*, 91 Va. 322 at 333, it is held "may" is "must" as to constables helping voters with ballots.

> "The general rule in the construction of statutes is that the term 'may' when used in a statute means 'must' or 'shall' in cases where the public interest and rights are concerned." *Bean vs. Simmons*, 9 Grat. (Va.) 389 at 391.

The preceding clause also required the Government to protect the appellant on all obligations incurred necessarily and solely for the performance of the contract of which the appellant cannot be otherwise relieved and, under these two clauses, clearly the Government is not entitled to recover its offset claimed in its answer.

Just compensation is the value of the property at time of taking. Loss on a requisitioned contract is the sum which will put contractor in as good a position pecuniarily as if property had not been taken, *U. S. vs. Brooks-Scanlon Corp.*, 265 U. S. 106; 44 Sup. Ct. 471.

POINT V.

As Article 14 requires Government to relieve contractors of all obligation incurred solely for performance of the contract, appellant should be, and by the award was, relieved from any further liability for the advance payment.

The reading of the contract and the award is all that is necessary on this point.

POINT VI.

Where witnesses, whose veracity is not attacked, testify to the necessary and material facts and no evidence is put on to contradict same but most of it was admitted in Claims Board hearings, such evidence constitutes a *prima facie* case and the Court of Claims is required to find such facts, and on its failure to do so, the case should be sent back with instructions to make such finding.

It is the duty of the Court of Claims to make a finding where the evidence is not disputed, for in *Kelly vs. Jackson,* 6 Pet. 622, 631, the Court said:

> "What is *prima facie* evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for the purpose. The jury is bound to consider it in that light unless it is invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported."

This was cited and approved in *George vs. Capital Traction Co.*, 295 Fed. 965, 54 Apps. D. C. 144, reversing such a case where the lower court without a jury made a finding of fact.

If this is not true, then the Court of Claims can arbitrarily in any or all cases foreclose any review by this Court, not only of the facts, but of the law by merely refusing to make a finding where the testimony is undisputed on some point that is necessary to be found to entitle a recovery. If the Court of Claims makes a finding contrary to all the evidence or makes a finding, for which there is no evidence to sustain, this Court can go back of this finding, just as it can go back of a verdict, which there is no evidence to sustain it.

Wherefore, it is respectfully submitted that the judgment should be reversed and the judgment for appellee vacated and the case sent back to the Court of Claims for a further findings of fact and with instructions that the appellee is not entitled to recover on the counterclaim.

RAYMOND M. HUDSON,
Attorney for Appellant.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 196

TOWAR COTTON MILLS, INC., APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 30) is reported in 59 Ct. Cls. 841.

JURISDICTION

The judgment to be reviewed was entered on June 9, 1924. (R. 35.) On July 18, 1924, a motion for new trial was seasonably made and entertained. On October 20, 1924, it was overruled. (R. 35.) An appeal was taken the same day (R. 35, 36), under Section 242 of the Judicial Code (later repealed by the Act of February 13, 1925, chap. 229, 43 Stat. 936, 941).

THE QUESTION

The appellant made a contract with the United States to furnish certain grey duck. By a supplemental contract, the Government advanced the sum of $32,100. The original contract contained a cancellation clause and after the Armistice the contract was canceled in accordance with such clause. The appellant presented a claim to the War Department because of such cancellation and an award was made upon such claim. The claim so presented by appellant includes all of the items that are now the subject of this suit. Some of such items were allowed in whole or in part and others were disallowed and the War Department made an award upon the claim as a whole, which award was accepted by appellant herein and the amount thereof applied upon the unpaid balance due the United States on account of the advance so made to appellant by the United States. The appellant, nearly three years after the acceptance of the award, brought this suit to recover the difference between the amount of its claim presented to the War Department and the amount of the award made by the War Department and accepted by appellant. The Government filed a counterclaim for the unpaid balance upon the advancement made by the Government to appellant after the application of the amount of the award. The Court of Claims found that appellant was not entitled to recover but that the Government should recover

the amount of $10,892.75, the unpaid balance on the advancement, together with the cost of printing the record. The questions, therefore, are whether the appellant can maintain an action to recover the difference between the amount which it claimed before the War Department and the amount which the War Department awarded and appellant accepted upon such claim, and whether judgment in favor of the United States was proper.

STATEMENT

The facts as found by the Court of Claims are as follows:

On June 24, 1918, the appellant, a Maine corporation, entered into a contract with the United States to furnish the Government 100,904 yards of grey duck at the contract price of $107,438.40. (R. 30.) The contract is Exhibit "A" to the petition and made a part of the findings by reference. (R. 30.) Article 14 of such contract provided in substance that as the contract was necessitated by a state of war and it was desirable that provision be made for its cancellation in the event of the termination or limitation of the war, "It is therefore provided that at any time, and from time to time, during the currency of this contract, the Chief of Ordnance may for any of the causes above stated notify the Contractor that any part of the articles then remaining undelivered shall not be manufactured or delivered." Said Article

14 of the contract then provided for a certain plan of settlement in the event of cancellation. (R. 7.)

On July 6, 1918, appellant entered into a supplemental contract with the United States, under which the United States advanced and paid to appellant the sum of $32,100.00. (R. 30.) By this contract it was provided that the money advanced was to be used in payment for machinery, equipment, and raw materials required in the performance of the principal agreement (R. 11), and that a certain percentage should be deducted from the vouchers thereafter to be paid to appellant until the full amount of the advancement had been paid back to the Government. (R. 11.) The payments as made were to be applied to the principal and thereafter to the interest accrued on the outstanding balances. (R. 11.) As security for the payment of said advancement, the appellant gave a demand note to the Government in the sum of $32,100.00, dated July 6, 1918, with interest at the rate of 6 per cent per annum from date until paid. (R. 30.)

The appellant began performance of this contract and complied with the terms thereof until November 15, 1918, when the United States cancelled the contract as provided in Article 14 thereof. At such time 19.02 per cent of said contract had been performed by appellant and 80.98 per cent was unperformed. The contract work which

was performed was paid for by the United States. (R. 31.) Appellant presented a claim for $36,-332.65 to the Purchase Claims Board and on appeal the claim was sent to the Board of Contract Adjustment where, on April 28, 1920, a decision was rendered by such board and in June, 1920, an award made by the War Department to appellant in the sum of $14,054.79 (R. 31), " which award was accepted by this plaintiff (appellant) on June 3, 1920." (R. 31.) A copy of the award is set out in the findings. (R. 31 to 33.) The award clearly identifies the original contract above referred to (R. 31), and among other things provides as follows (R. 33):

> The Secretary of War hereby awards to said claimant the sum of $14,054.79 (block 3), which sum, in conjunction with the payments herein above mentioned made or to be made for the articles, work or services heretofore delivered and accepted shall be in full adjustment, payment and discharge of said agreement.

At the end of such award the following appears (R. 33):

> Accepted June 3rd, 1920. Towar Cotton Mills, Inc. (Sgd.), Claimant, by Henry M. Towar (Sgd.), Treas.

" All of the items set up by plaintiff in this suit were embodied in the claim on which the aforesaid award was made." (R. 34.) Recoupment pay-

ments were made upon the $32,100 advanced on July 6, 1918, as follows:

October 31, 1918	$1,403.50
November 8, 1918	1,409.41
November 15, 1918	1,427.91
November 19, 1918	1,244.78
November 25, 1918	1,160.26
December 5, 1918	515.60
Aggregating	7,152.46

all of which was credited on the principal sum. The United States also credited the sum of $14,054.79, the amount of the aforesaid award, making a total credit of $21,207.25, which left due on the loan the sum of $10,892.75, as of June 3, 1920, the date the appellant accepted the award. (R. 34.)

Based upon these findings, the Court of Claims rendered judgment for the United States in the sum of $10,892.75 with interest thereon at the rate of 6 per cent per annum from June 3, 1920, until paid, together with the costs of printing the record. (R. 35.)

ARGUMENT

SUMMARY

I. The appellant accepted the award made by the United States in full adjustment, payment and discharge of the claims made in this suit and can not now maintain this suit for any claim on account of the cancellation of said agreement.

II. If this is a claim under the Dent Act, the Court of Claims had no jurisdiction thereof, since

the Secretary of War had made an award which was accepted by appellant.

III. The appellant failed to prove its case.

IV. The Court of Claims properly awarded the Government judgment for the balance due by the appellant upon the advances made by the United States to the appellant.

I

THE APPELLANT ACCEPTED THE AWARD MADE BY THE UNITED STATES IN FULL ADJUSTMENT, PAYMENT AND DISCHARGE OF THE CLAIMS MADE IN THIS SUIT AND CANNOT NOW MAINTAIN THIS SUIT FOR ANY CLAIM ON ACCOUNT OF THE CANCELLATION OF SAID AGREEMENT.

The contract by its terms provided for cancellation thereof in the event of the termination or limitation of the War. (R. 7.) Following the cancellation thereof, after the Armistice (R. 31), the appellant made a claim because of such cancellation before the War Department, which was there considered and upon which an award was made and accepted by appellant. (R. 31.) The award clearly identified the original contract and referred to the cancellation thereof. (R. 31.) It then shows the amount awarded to appellant to be the sum of $14,054.79 (R. 32), and provides (R. 33):

> The Secretary of War hereby awards to said claimant the sum of $14,054.79 (block 3), which sum, in conjunction with the payments herein above mentioned made or to be

> made for the articles, work or services heretofore delivered and accepted shall be in full adjustment, payment, and discharge of said agreement.

It is also clearly shown by the findings that appellant accepted the award. Upon this the findings are as follows: " which award was accepted by plaintiff on June 3, 1920." (R. 31.)

At the end of such award there appears the following (R. 33):

> Accepted June 3rd, 1920, Towar Cotton Mills, Inc. (Sgd.), Claimant, by Henry M. Towar (Sgd.), Treas.

The court below has further found, which will also be apparent from an examination of the award, that all of the items set up by appellant in this suit were embodied in the claim on which the aforesaid award was made. (R. 34.)

The appellant, almost three years later (R. 1, 33), brought this suit in an effort to recover the difference between what it originally claimed before the War Department and the amount of the award so made by the War Department and accepted by appellant.

The appellant in its brief suggests that this award was attempted to be made by the War Department under the provisions of the Dent Act which are hereinafter set out and discussed and that such act did not authorize the Secretary of

War to make an award in a case of this kind where there was a formal contract. We deem it unnecessary to discuss or ask this Court to decide whether the award was within the power given to the Secretary of War under the Dent Act or whether the Secretary of War attempted to act under such law, since we contend that a decision of such questions will not affect this case. When appellant submits its claim and contentions to the Secretary of War and they are there duly considered and a determination thereof is accepted by appellant and the benefits thereof received by it, the appellant is thereby precluded from making any further claim with reference to the matters so settled. This was decided by this Court long ago in the case of *United States* v. *Adams,* 7 Wall. 463 (see p. 478 and following), and has been followed many times since that decision. See *Savage, Executrix* v. *United States,* 92 U. S. 382, 388; *United States* v. *Child & Co.,* 12 Wall. 232, 243; *United States* v. *Justice,* 14 Wall. 535; *Mason* v. *United States,* 17 Wall. 67; *United States* v. *Mowry,* 154 U. S. 564.

Appellant in its brief contends that the courts will not permit a settlement of this kind as the same is without consideration. However, the cases above cited clearly establish the proposition that where as in this case the amount is disputed and a settlement is made, the same will be sustained by the courts and there is ample consideration for such settlement.

II

IF THIS IS A CLAIM UNDER THE DENT ACT, THE COURT OF CLAIMS HAD NO JURISDICTION THEREOF, SINCE THE SECRETARY OF WAR HAD MADE AN AWARD WHICH WAS ACCEPTED BY APPELLANT

Assuming that this claim is one arising under the Dent Act, and that the Secretary of War attempted to act thereunder (which we contend is entirely immaterial), then there was no jurisdiction in the Court of Claims to entertain this suit. The award recites that the contract had not been executed in the manner prescribed by law. (R. 31.) The pertinent provisions of the Dent Act, c. 94 (40 Stat. 1272), are as follows:

> That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been per-

formed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law.

* * * * *

SEC. 2. That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company or corporation referred to in Section 1 hereof, to find and award fair and just compensation in the cases specified in said Section in the event that such individual, firm, company or corporation shall not be willing to accept the adjustment, payment or compensation offered by the Secretary of War as hereinbefore provided, or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment or compensation as provided for in said section.

The statute, after empowering the Secretary of War to make adjustment, payment and discharge of agreements express or implied, of which the Court of Claims but for such act would not have jurisdiction, expressly provides that (1) if the claimant is not willing to accept the adjustment, payment or compensation offered by the Secretary of War, or (2) if the Secretary of War fails or refuses to offer a satisfactory adjustment, then the Court of Claims shall have jurisdiction of such claim. The Government, therefore, contends that,

in order for the Court of Claims to have jurisdiction of a claim under the Dent Act, the claimant must either refuse to accept the award or the Secretary of War must fail or refuse to make an award. Neither of these things happened here; the Secretary of War did make an award and it was accepted by appellant. Therefore, the Court of Claims has no jurisdiction under the Dent Act.

III

THE APPELLANT FAILED TO PROVE ITS CASE

Assuming, without conceding, that appellant is right in its legal contentions to the effect that it is not foreclosed by the settlement which has been made, and which it has accepted, still appellant cannot succeed on this appeal for the reason that it has failed to prove its case. An examination of the findings of fact will show that there is not a single finding to establish any loss or damage suffered or sustained by appellant because of the cancellation of this contract. The findings in substance show the making of the contract, the cancellation thereof, the submission of a claim based thereon, but without any proof as to the items thereof, the making of an award upon such claim and the facts concerning the amount due by appellant to the Government because of the advancement. In all of this, there is not one word to show that appellant suffered any loss, the amount thereof, or that he is entitled to recover because of such

loss. The Court of Claims in its memorandum opinion says: "In this case the plaintiff has not proved the items of its claim." (R. 34.) It would seem that further discussion of this question is unnecessary.

IV

THE COURT OF CLAIMS PROPERLY AWARDED THE GOVERNMENT JUDGMENT FOR THE BALANCE DUE FROM THE APPELLANT UPON THE ADVANCES MADE BY THE UNITED STATES TO THE APPELLANT

The Government advanced to appellant under the supplemental contract dated July 6, 1918, the sum of $32,100. (R. 30.) The Government had been paid by deductions from vouchers of appellant the sum of $7,152.46, and by application of the amount of the award, $14,054.79, making a total payment by appellant of $21,207.25, thus reducing the indebtedness of appellant to the Government to the sum of $10,892.75, as of the date of June 3, 1920, upon which date appellant accepted the award. (R. 34.) For this sum the court rendered judgment in favor of the United States. (R. 35.) The appellant in its brief apparently now questions the propriety of this judgment. It is felt that it is only fair to say that this is the first time that appellant has questioned the existence of this indebtedness in favor of the Government. In the bill of complaint, or petition filed by the appellant, in referring to the application of the amount of the award to the advanced pay-

ment made by the Government, appellant does not seem to question the propriety or existence of the claim by the Government against appellant. (R. 2.) The Government interposed a counterclaim setting up this indebtedness (R. 26), and to such counterclaim appellant filed an answer (R. 29), in which it says: "The United States is not entitled to recover anything from it on its counterclaim or set-off as the said defendant is indebted to the plaintiff in a greater sum than the amount claimed in said set-off" (R. 29).

It would seem that the findings of fact showing the existence of the advance payment by the United States to appellant, and that there was a balance due to the United States from appellant upon such advancement (R. 34), are sufficient to sustain the judgment which the Court of Claims rendered in favor of the United States. Plaintiff now contends, however, that the award, a copy of which is set out in the findings (R. 31–32), shows that there were no claims by the Government to be deducted. It is assumed that appellant refers to Item 13 of the "Brief of Settlement" (R. 32), which reads as follows:

> Claims of Government to be deducted $——.

It is quite clear from the record in this case that the award was intended by both parties and did in fact refer to and settle only the original contract dated June 24, 1918, and had no effect whatever

upon the supplemental contract dated July 6, 1918, or the advance payment made thereunder.

The award expressly states that it was dealing with "an agreement * * * entered into * * * on or about the 24th day of June, 1918" (R. 31), which was the original contract (R. 2 and 30). The award also identifies the contract which was covered by said award as "3. Original contract number 5645 EQ. Dated June 24, 1918." (R. 32.) This was the number and date of the original contract. (R. 2.) The award was in full adjustment, payment, and discharge of "said agreement." (R. 33.) No agreement other than the original agreement dated June 24, 1918, is referred to or mentioned at any place in said award. The supplemental agreement under which the advance payment was made and the balance was due was dated July 6, 1918 (R. 13 and 30), and such agreement is not referred to or mentioned in the award. Therefore, we contend that the clause referred to by appellant, which left blank any amount to be deducted, had reference only to claims by the Government against appellant growing out of the original contract, and had no effect whatever upon the supplemental contract or the money due to the Government thereunder. There was no attempt to cancel or end the supplemental contract.

The subsequent acts of appellant and the United States prove the correctness of the Government's

contention, and are such as to estop appellant from a contrary contention.

The appellant in its bill of complaint herein admits that it signed the voucher covering the amount of the award with the information that the Government was going to apply the same upon the balance due by appellant to the United States because of such advance payments. (R. 2.) The answer of appellant to the counterclaim herein, as above shown, claims that the Government is not entitled to recover on its counterclaim, not because the sum was settled in the award, but because there is an excess amount which appellant claimed was due to it. (R. 29.) In addition to these facts, so far as this record shows, the appellant permitted the application of the full amount of the award upon the balance due by it to the United States because of such advance payments and never complained until almost three years later when it filed this suit and then it did not complain because of the application of the award as aforesaid and, as before stated, has offered no complaint until the brief filed by appellant in this Court.

We respectfully submit that, in the first place, there is nothing in the award to justify the contention that it was intended to or did, in fact, make an award of approximately $14,000 over and above the amounts due by appellant to the Government because of these advance payments, and that even if appellant did understand such to be the nature

of the award, that it cannot now be heard to complain, having by its actions heretofore taken another position, and having so long delayed presentation of its present contention.

For the reasons hereinbefore set forth, it is respectfully submitted that the judgment of the lower court should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General of the United States.
HERMAN J. GALLOWAY,
Assistant Attorney General.

JANUARY, 1926.

○

SUPREME COURT OF THE UNITED STATES.

No. 196.—October Term, 1925.

Towar Cotton Mills, Inc., Appellant,
vs.
The United States.
} Appeal from the Court of Claims.

[March 1, 1926.]

Mr. Justice Stone delivered the opinion of the Court.

This appeal was taken from a judgment of the Court of Claims (Jud. Code, § 142, before its repeal by Act of February 13, 1925) dismissing appellant's petition and adjudging that the United States was entitled to recover on a counterclaim set up in its answer in that court.

The appellant entered into a contract with the Government, dated January 24, 1918, to supply it with a quantity of cloth at a specified price. It was provided by the contract that the Government might, in the event of the termination of the war, cancel the contract with respect to cloth not delivered. The contract contained a clause for ascertaining the balance due and payable to the appellant in case of cancellation. By a second contract of July 6, 1918, the Government undertook to advance money to appellant for the purchase of machinery, equipment and raw material required for the performance of its original contract. Appellant gave its demand note for the principal sum advanced, with interest at 6%, and it was provided by the contract that specified deductions from payments, as they became due from the Government for the cloth delivered, should be credited on the note.

On November 15, 1918, the Government cancelled the original contract after 19.02% of the deliveries stipulated for had been made. Appellant presented a claim to the War Department for the amount due under this contract, and after proceedings had before the Purchase Claims Board and an appeal to the Board of Contract Adjustment, an award was made to appellant, by authority of the Secretary of War, in the sum of $14,054.59, which was stated by its terms to be "in full adjustment, payment and discharge of said agreement" of June 24, 1918.

On June 3, 1920, appellant accepted the award by a formal statement to that effect written at the end of it and signed by the appellant, by its treasurer.

The cause of action stated by appellant is upon its first contract of June 24, 1918, and, as the Court of Claims found, all of the items set up by appellant in this suit were embodied in its claim to the War Department on which the award was made. The Government pleaded, by way of counterclaim, the balance due upon the appellant's promissory note, less the amount of the award; and judgment was given against the appellant for this amount, with accrued interest.

Appellant, notwithstanding such cases as *United States* v. *Adams*, 7 Wall. 463; *Savage, Executrix* v. *United States*, 92 U. S. 382, 388; *United States* v. *Child & Co.*, 12 Wall. 232, 243; *United States* v. *Justice*, 14 Wall. 535; *Mason* v. *United States*, 17 Wall. 67, seeks to avoid the effect of the accepted award by setting up that the Secretary of War was without authority to make it and, upon various technical grounds, that appellant's acceptance was not binding.

It is unnecessary for us to consider these contentions; for there are no findings by the Court of Claims that appellant suffered any loss or damage by reason of the cancellation of the contract, and in fact, no findings which would support a judgment in its favor on any theory.

The appellant also objects that if the award is valid, it is a bar to the Government's counterclaim. But an examination of the award, which is set out in detail in the findings, shows that the award was concerned only with the first contract of June 24, 1918, and that the items and computations which entered into it related only to that contract. The amount due from the Government upon appellant's note and second contract was unaffected by it.

There is no merit in the objection that the amount of the award should have been credited on appellant's note as of the date of the cancellation of the first contract, thus reducing the amount of interest payable on the note. If the award was valid, it was properly credited as of its date. If it was invalid, appellant, as already pointed out, has laid no foundation for any offset to the amount due on the note.

Judgment affirmed.